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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 890 and 894

RIN 3206–AM97

Federal Employees Health Benefits Program and Federal Employees Dental and Vision Insurance Program: Excepted Service and Pathways Programs Miscellaneous Clarifications and Corrections

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a final rule to make technical corrections to the Federal Employees Health Benefits Program (FEHBP) and the Federal Employees Dental and Vision Insurance Program (FEDVIP) regulations allowing coverage for participants in the Pathways Programs. The Pathways Programs were created by Executive Order (E.O.) 13562, signed by the President on December 27, 2010, and are designed to enable the Federal Government to compete effectively for students and recent graduates by improving its recruitment efforts through internships and similar programs with Federal agencies.

DATES: Effective August 25, 2016.

FOR FURTHER INFORMATION CONTACT: Ronald Brown, Policy Analyst, (202) 606–0004, or by email to *Ronald.Brown@opm.gov.*

SUPPLEMENTARY INFORMATION: The Pathways Programs offer clear paths to civil service careers for recent graduates and provide meaningful training, mentoring, and career-development opportunities through internships and similar programs with Federal Government agencies. For more information on the Pathways Programs see the final rule, "Excepted Service, Career and Career-Conditional Employment; and Pathways Programs," available at 77 FR 28193 (May 11, 2012) (Pathways regulation.) On January 6, 2014, OPM published an interim final regulation updating title 5 Code of Federal Regulations, §§ 890.303 and 894.302, to conform with the Pathways regulation. OPM received one comment not related to the substance of this technical correction. Accordingly, this final regulation adopts the interim final regulation with no changes.

Analysis of and Responses to Public Comments

We received one comment on the interim final rule relating to agency guidance materials.

Comment: One commenter asked if OPM will issue new guidance to Federal agencies concerning the changed scheduling authority for Pathways Programs participants.

Response: OPM is not planning to issue guidance to Federal agencies on this regulation as no substantive policy changes were made. The interim final rule made technical changes to FEHBP and FEDVIP regulations to conform with the final Pathways regulation published on May 11, 2012 (77 FR 28194). The only change to the FEHBP regulation was the title of the schedule appointment authority for Pathways Programs interns. See 5 CFR 890.303(e)(2). In the FEDVIP regulation, the intern programs were renamed. See 5 CFR 894.302(f).

Agencies should continue to refer to the supplementary information published in the aforementioned final rule and the guidance that is on the OPM Web site at: *http://www.opm.gov/policy-data-oversight/hiring-authorities/students-recent-graduates/.*

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulation only affects health and dental and vision insurance benefits of Federal employees and retirees.

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

Federalism

We have examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule will not have any negative impact on the rights, roles and responsibilities of State, local, or tribal governments.

List of Subjects in 5 CFR Parts 890 and 894

Administrative practice and procedure, Government employees, Health insurance, Retirement.

U.S. Office of Personnel Management.

Beth F. Cobert,

Acting Director.

Accordingly, OPM is amending 5 CFR chapter I as follows:

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

■ 1. The authority citation for part 890 continues to read as follows:

Authority: 5 U.S.C. 8913; Sec. 890.301 also issued under sec. 311 of Pub. L. 111–3, 123 Stat. 64; Sec. 890.111 also issued under section 1622(b) of Pub. L. 104–106, 110 Stat. 521; Sec. 890.112 also issued under section 1 of Pub. L. 110–279, 122 Stat. 2604; Sec. 890.803 also issued under 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c–1; subpart L also issued under sec. 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; Sec. 890.102 also issued under sections 11202(f), 11232(e), 11246(b) and (c) of Pub. L. 105–33, 111 Stat. 251; and section 721 of Pub. L. 105–261, 112 Stat. 2061; Pub. L. 111–148, as amended by Pub. L. 111–152.

Subpart C—Enrollment

■ 2. In § 890.303, revise paragraph (e)(2) to read as follows:

§ 890.303 Continuation of enrollment.

* * * * *

(e) * * *

(2) However, in the case of an employee who is employed under an OPM approved career-related work-study program under Schedule D of at least one year's duration and who is expected to be in a pay status during not less than one-third of the total period of time from the date of the first appointment to the completion of the work-study program, his/her enrollment continues while he/she is in nonpay status so long as he/she is participating in the work-study program.

* * * * *

PART 894—FEDERAL EMPLOYEES DENTAL AND VISION INSURANCE PROGRAM

■ 3. The authority citation for part 894 continues to read as follows:

Authority: 5 U.S.C. 8962; 5 U.S.C. 8992; Subpart C also issued under section 1 of Pub. L. 110–279, 122 Stat. 2604.

Subpart C—Eligibility

■ 4. In § 894.302, paragraph (f) is revised to read as follows:

§ 894.302 What is an excluded position?

* * * * *

(f) Expected to work fewer than six months in each year. *Exception:* you are eligible if you receive an appointment of at least one year's duration as an Intern under § 213.3402(a) of this chapter. To qualify, you must be expected to be in a pay status for at least one-third of the total period of time from the date of the first appointment to the completion of the work-study program.

* * * * *

[FR Doc. 2016–20186 Filed 8–24–16; 8:45 am]

BILLING CODE 6325–63–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 334

RIN 3064–AE29

Removal of FDIC Regulations Regarding Fair Credit Reporting Transferred to the Consumer Financial Protection Bureau

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule; correction.

SUMMARY: The Federal Deposit Insurance Corporation ("FDIC") is correcting a Final Rule that appeared in the **Federal Register** on October 28, 2015, regarding removal of certain FDIC regulations regarding Fair Credit Reporting transferred to the Consumer Financial Protection Bureau in Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

DATES: The correction is effective August 25, 2016.

FOR FURTHER INFORMATION CONTACT: Richard M. Schwartz, Counsel, Legal Division, (202) 898–7424 or *rischwartz@fdic.gov.*

SUPPLEMENTARY INFORMATION: The Federal Deposit Insurance Corporation ("FDIC") is correcting a Final Rule that appeared in the **Federal Register** on October 28, 2015 (80 FR 65913), regarding removal of certain FDIC regulations regarding Fair Credit Reporting transferred to the Consumer Financial Protection Bureau in Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[1] This publication removed and reserved Subparts C and E to 12 Code of Federal Regulations (CFR) Part 334, but mistakenly failed to remove and reserve the appendices that applied to those Subparts.

In FR Doc. 2015–27291, appearing on pages 65913 *et seq.* in the **Federal Register** of October 28, 2015, the following correction is made:

Authority and Issuance

For the reasons stated in the preamble, the Board of Directors of the Federal Deposit Insurance Corporation amends 12 CFR part 334 by making the following correcting amendments:

PART 334—FAIR CREDIT REPORTING

■ 1. The authority citation for part 334 continues to read as follows:

Authority: 12 U.S.C. 1818, 1819 (Tenth), and 1831p–1; 15 U.S.C. 1681a, 1681b, 1681c, 1681m, 1681s, 1681s–2, 1681s–3, 1681t, 1681w, 6801 *et seq.*, Pub. L. 108–159, 117 Stat. 1952.

Subpart C to Part 334 [Removed and Reserved]

■ 2. Remove and reserve appendix C.

Subpart E to Part 334 [Removed and Reserved]

■ 3. Remove and reserve appendix E.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2016–20328 Filed 8–24–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2015–3599; Airspace Docket No. 15–AGL–14]

Establishment of Class E Airspace; Dupree, SD

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E en route domestic airspace in the Dupree, SD, area. Controlled airspace is necessary to facilitate vectoring of Instrument Flight Rules (IFR) aircraft under control of Minneapolis Air Route Traffic Control Center (ARTCC). This action enhances the safety and efficiency of IFR operations within the National Airspace System. This action also removes the Federal airways exclusionary language from the regulatory text.

DATES: Effective 0901 UTC, November 10, 2016. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.9Z, Airspace Designations and Reporting Points, and subsequent amendments can be viewed on line at *http://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: 202–267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal-regulations/ibr_locations.html.*

FAA Order 7400.9, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

FOR FURTHER INFORMATION CONTACT: Raul Garza, Jr., Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone: (817) 222–5874.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes controlled airspace in the Dupree, SD, area.

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[1] Public Law 111–203, 124 Stat. 1376 (2010).

History

On February 17, 2016, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to establish Class E Airspace in the Dupree, SD area. (81 FR 8027) Docket No. FAA–2015–3599. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received. Subsequent to publication, exclusionary language for Federal airways was inadvertently added to the regulatory text.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.9Z, airspace Designations and Reporting Points, dated August 6, 2015, and effective September 15, 2015. FAA Order 7400.9Z is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.9Z lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 establishes Class E airspace extending upward from 1,200 feet above the surface in the Dupree, SD area, to facilitate vectoring of IFR aircraft under control of Minneapolis ARTCC. Controlled airspace is needed for the safety and management of IFR operations in the National Airspace System. Exclusionary language for Federal airways in the regulatory text is removed.

Class E airspace designations are published in Paragraph 6006 of FAA Order 7400.9Z, dated August 6, 2015, and effective September 15, 2015, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a "significant regulatory action'' under Executive Order 12866; (2) is not a "significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures,'' paragraph 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exists that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120, E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9Z, Airspace Designations and Reporting Points, dated August 6, 2015, effective September 15, 2015, is amended as follows:

Paragraph 6006 En Route Domestic Airspace Areas

* * * * *

AGL SD E6 Dupree, SD [New]

That airspace extending upward from 1,200 feet above the surface within an area bounded by lat. 46°43′39″ N., long. 099°00′09″ W.; to lat. 46°43′12″ N., long. 098°27′11″ W.; to lat. 45°53′47″ N., long. 098°15′19″ W.; to lat. 45°15′09″ N., long. 098°45′49″ W.; to lat. 44°40′45″ N., long. 099°45′58″ W.; to lat. 44°44′16″ N., long. 100°47′46″ W.; to lat. 44°52′34″ N., long. 100°57′29″ W.; to lat. 45°28′56″ N., long. 102°46′15″ W.; to lat. 45°34′49″ N., long. 102°46′44″ W.; to lat. 45°40′17″ N., long. 099°00′09″ W., thence to the point of beginning.

Issued in Fort Worth, TX, on August 15, 2016.

Christopher L. Southerland,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2016–20145 Filed 8–24–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2016–3785; Airspace Docket No. 16–ASW–9]

Establishment of Class E Airspace; Slaton, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class E airspace at Slaton, TX. Controlled airspace is necessary to accommodate new Standard Instrument Approach Procedures developed at Slaton Municipal Airport, for the safety and management of Instrument Flight Rules (IFR) operations at the airport.

DATES: Effective 0901 UTC, November 10, 2016. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

ADDRESSES: FAA Order 7400.9Z, Airspace Designations and Reporting Points, and subsequent amendments can be viewed on line at *http://www.faa.gov/air_traffic/publications/*. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: 202–267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal-regulations/ibr_locations.html*.

FAA Order 7400.9, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

FOR FURTHER INFORMATION CONTACT: Raul Garza, Jr., Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest

Region, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone: (817) 222–5874.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it establishes controlled airspace at Slaton Municipal Airport, Slaton, TX.

History

On May 6, 2016, the FAA published in the **Federal Register** a notice of proposed rulemaking (NPRM) to establish Class E Airspace in the Slaton, TX area. (81 FR 27359) FAA–2016–3785. Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9Z dated August 6, 2015, and effective September 15, 2015, which is incorporated by reference in 14 CFR part 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

Availability and Summary of Documents for Incorporation by Reference

This document amends FAA Order 7400.9Z, airspace Designations and Reporting Points, dated August 6, 2015, and effective September 15, 2015. FAA Order 7400.9Z is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.9Z lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Rule

This amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 establishes Class E airspace extending upward from 700 feet above the surface within a 7-mile radius of Slaton Municipal Airport, Slaton, TX, to accommodate new standard instrument approach procedures. Controlled airspace is needed for the safety and management of IFR operations at the airport.

Class E airspace areas are published in Section 6005 of FAA Order 7400.9Z, dated August 6, 2015, and effective September 15, 2015, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures," paragraph 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exists that warrant preparation of an environmental assessment.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120, E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9Z, Airspace Designations and Reporting Points, dated August 6, 2015, effective September 15, 2015, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth.

* * * * *

ASW TX E5 Slaton, TX [New]

Slaton Municipal Airport, TX
(Lat. 33°29′07″ N., long. 101°39′42″ W.)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Slaton Municipal Airport.

Issued in Fort Worth, TX, on August 15, 2016.

Christopher L. Southerland,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2016–20144 Filed 8–24–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31092; Amdt. No. 3710]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide for the safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective August 25, 2016. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 25, 2016.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops–M30, 1200 New Jersey Avenue SE., West Bldg., Ground Floor, Washington, DC 20590–0001;
2. The FAA Air Traffic Organization Service Area in which the affected airport is located;
3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,
4. The National Archives and Records Administration (NARA).

For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center online at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedure Standards Branch (AFS–420) Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (NFDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained on FAA form documents is unnecessary.

This amendment provides the affected CFR sections, and specifies the SIAPs and Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff Minimums and ODPs as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and Takeoff Minimums and ODP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP and Takeoff Minimums and ODP as modified by FDC permanent NOTAMs.

The SIAPs and Takeoff Minimums and ODPs, as modified by FDC permanent NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for these SIAP and Takeoff Minimums and ODP amendments require making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making these SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on August 12, 2016.

John S. Duncan,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal regulations, Part 97, (14 CFR part 97), is amended by amending Standard Instrument Approach Procedures and Takeoff Minimums and ODPs, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33, 97.35 [Amended]

■ 2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

* * * *Effective Upon Publication*

AIRAC Date	State	City	Airport	FDC No.	FDC Date	Subject
15–Sep–16	NE	Omaha	Eppley Airfield	6/0889	8/1/16	RNAV (RNP) Z RWY 14R, Orig-A.
15–Sep–16	OK	Oklahoma City	Sundance	6/1625	8/2/16	VOR RWY 17. Amdt 1D.
15–Sep–16	OK	Oklahoma City	Sundance	6/1626	8/2/16	RNAV (GPS) RWY 17, Amdt 1B.
15–Sep–16	OK	Oklahoma City	Sundance	6/1627	8/2/16	RNAV (GPS) RWY 35, Amdt 1A.
15–Sep–16	MN	Madison	Lac Qui Parle County	6/2206	8/3/16	NDB RWY 32, Amdt 4A.
15–Sep–16	MN	Madison	Lac Qui Parle County	6/2207	8/3/16	RNAV (GPS) RWY 14, Orig-A.
15–Sep–16	MN	Madison	Lac Qui Parle County	6/2208	8/3/16	RNAV (GPS) RWY 32, Orig-A.
15–Sep–16	AR	Hope	Hope Muni	6/2725	7/1/16	RNAV (GPS) RWY 16, Orig.
15–Sep–16	IA	Storm Lake	Storm Lake Muni	6/2927	8/3/16	RNAV (GPS) RWY 17, Orig-A.
15–Sep–16	IA	Storm Lake	Storm Lake Muni	6/2930	8/3/16	RNAV (GPS) RWY 35, Amdt 1.
15–Sep–16	TX	Canadian	Hemphill County	6/2978	8/3/16	RNAV (GPS) RWY 22, Amdt 2.
15–Sep–16	IA	Boone	Boone Muni	6/3301	8/2/16	RNAV (GPS) RWY 15, Amdt 1A.
15–Sep–16	NE	Hebron	Hebron Muni	6/3425	8/2/16	GPS RWY 12, Orig-C.
15–Sep–16	NE	Hebron	Hebron Muni	6/3426	8/2/16	GPS RWY 30, Orig-B.
15–Sep–16	NE	Hebron	Hebron Muni	6/3432	8/2/16	NDB RWY 12, Amdt 4B.
15–Sep–16	PA	Titusville	Titusville	6/3571	8/3/16	RNAV (GPS) RWY 1, Orig.
15–Sep–16	VT	Springfield	Hartness State (Springfield)	6/3594	8/3/16	LOC/DME RWY 5, Amdt 4.
15–Sep–16	VT	Springfield	Hartness State (Springfield)	6/3598	8/3/16	RNAV (GPS) RWY 5, Orig-A.
15–Sep–16	NY	Westhampton Beach.	Francis S Gabreski	6/3600	8/3/16	RNAV (GPS) RWY 6, Amdt 2A.
15–Sep–16	NY	Westhampton Beach.	Francis S Gabreski	6/3601	8/3/16	RNAV (GPS) RWY 24, Amdt 2A.
15–Sep–16	NY	Westhampton Beach.	Francis S Gabreski	6/3603	8/3/16	TACAN RWY 24, Orig-A.
15–Sep–16	NY	Westhampton Beach.	Francis S Gabreski	6/3604	8/3/16	TACAN RWY 6, Orig-A.
15–Sep–16	NY	Westhampton Beach.	Francis S Gabreski	6/3606	8/3/16	ILS OR LOC RWY 24, Amdt 10A.
15–Sep–16	MO	Fredericktown	A Paul Vance Fredericktown Rgnl.	6/3682	8/2/16	RNAV (GPS) RWY 19, Amdt 1A.
15–Sep–16	MO	Fredericktown	A Paul Vance Fredericktown Rgnl.	6/3683	8/2/16	VOR RWY 19, Amdt 1A.
15–Sep–16	WI	Hayward	Sawyer County	6/3704	8/2/16	RNAV (GPS) RWY 21, Amdt 1A.
15–Sep–16	WI	Hayward	Sawyer County	6/3705	8/2/16	RNAV (GPS) RWY 3, Orig-C.
15–Sep–16	IN	Peru	Peru Muni	6/3718	8/2/16	VOR RWY 1, Amdt 8A.
15–Sep–16	WI	Phillips	Price County	6/3722	8/2/16	RNAV (GPS) RWY 6, Orig-A.
15–Sep–16	WI	Phillips	Price County	6/3723	8/2/16	RNAV (GPS) RWY 24, Orig-A.
15–Sep–16	MI	Lapeer	Dupont-Lapeer	6/3732	8/2/16	VOR–A, Orig.
15–Sep–16	TX	Stephenville	Stephenville Clark Rgnl	6/3739	8/2/16	VOR/DME–A, Amdt 1.
15–Sep–16	TX	Stephenville	Stephenville Clark Rgnl	6/3741	8/2/16	RNAV (GPS) RWY 14, Orig.
15–Sep–16	TX	Stephenville	Stephenville Clark Rgnl	6/3742	8/2/16	RNAV (GPS) RWY 32, Orig.
15–Sep–16	MN	Thief River Falls	Thief River Falls Rgnl	6/3882	8/3/16	VOR/DME RWY 13, Amdt 2B.
15–Sep–16	MN	Thief River Falls	Thief River Falls Rgnl	6/3883	8/3/16	VOR RWY 13, Amdt 9.
15–Sep–16	MN	Thief River Falls	Thief River Falls Rgnl	6/3884	8/3/16	VOR RWY 31, Amdt 8B.
15–Sep–16	NY	Newburgh	Stewart Intl	6/4134	8/9/16	RNAV (GPS) RWY 27, Amdt 1B.
15–Sep–16	NY	Newburgh	Stewart Intl	6/4135	8/9/16	RNAV (GPS) RWY 34, Amdt 1B.
15–Sep–16	NY	Newburgh	Stewart Intl	6/4136	8/9/16	ILS OR LOC RWY 27, Amdt 1B.
15–Sep–16	NY	Newburgh	Stewart Intl	6/4137	8/9/16	ILS OR LOC RWY 9, ILS RWY 9 (SA CAT I), ILS RWY 9 (CAT II & III), Amdt 13B.
15–Sep–16	NY	Newburgh	Stewart Intl	6/4138	8/9/16	RNAV (GPS) RWY 9, Amdt 1B.
15–Sep–16	NY	Newburgh	Stewart Intl	6/4139	8/9/16	RNAV (GPS) RWY 16, Amdt 1A.
15–Sep–16	NY	Newburgh	Stewart Intl	6/4140	8/9/16	VOR RWY 27, Amdt 5A.
15–Sep–16	NY	Newburgh	Stewart Intl	6/4142	8/9/16	Takeoff Minimums and Obstacle DP, Amdt 6.
15–Sep–16	TX	Corpus Christi	Corpus Christi Intl	6/4158	8/1/16	VOR OR TACAN RWY 18, Amdt 28A.
15–Sep–16	TN	Livingston	Livingston Muni	6/5091	8/3/16	RNAV (GPS) RWY 21, Amdt 1.
15–Sep–16	TN	Livingston	Livingston Muni	6/5092	8/3/16	VOR/DME RWY 21, Amdt 5A.
15–Sep–16	TN	Livingston	Livingston Muni	6/5094	8/3/16	RNAV (GPS) RWY 3, Amdt 1A.
15–Sep–16	TN	Knoxville	Knoxville Downtown Island	6/5095	8/3/16	RNAV (GPS) RWY 26, Orig-B.
15–Sep–16	WI	Cable	Cable Union	6/5152	8/1/16	RNAV (GPS) RWY 35, Orig.
15–Sep–16	MI	Muskegon	Muskegon County	6/5170	8/1/16	RNAV (GPS) RWY 32, Amdt 2.
15–Sep–16	SD	Winner	Winner Rgnl	6/5299	8/2/16	RNAV (GPS) RWY 13, Orig-A.
15–Sep–16	SD	Winner	Winner Rgnl	6/5300	8/2/16	VOR–A, Amdt 7A.
15–Sep–16	KS	Benton	Lloyd Stearman Field	6/5324	8/1/16	RNAV (GPS) RWY 17, Orig.
15–Sep–16	WI	Stevens Point	Stevens Point Muni	6/5437	8/3/16	RNAV (GPS) RWY 30, Orig.
15–Sep–16	WI	Stevens Point	Stevens Point Muni	6/5438	8/3/16	RNAV (GPS) RWY 12, Orig.
15–Sep–16	OH	Coshocton	Richard Downing	6/5702	8/3/16	Takeoff Minimums and Obstacle DP, Amdt 1.
15–Sep–16	OK	Oklahoma City	Will Rogers World	6/6047	8/1/16	ILS OR LOC RWY 17R, Amdt 12A.

AIRAC Date	State	City	Airport	FDC No.	FDC Date	Subject
15–Sep–16 ...	OK	Oklahoma City	Will Rogers World	6/6049	8/1/16	ILS OR LOC/DME RWY 35L, Amdt 2A.
15–Sep–16 ...	OK	Oklahoma City	Will Rogers World	6/6051	8/1/16	ILS OR LOC RWY 17L, Amdt 3A.
15–Sep–16 ...	OK	Oklahoma City	Will Rogers World	6/6054	8/1/16	ILS OR LOC/DME RWY 35R, ILS RWY 35R (CAT II), ILS RWY 35R (SA CAT I), Amdt 10A.
15–Sep–16 ...	OK	Oklahoma City	Will Rogers World	6/6055	8/1/16	RNAV (RNP) Z RWY 17L, Amdt 3A.
15–Sep–16 ...	OK	Oklahoma City	Will Rogers World	6/6056	8/1/16	RNAV (RNP) Z RWY 17R, Amdt 1A.
15–Sep–16 ...	OK	Oklahoma City	Will Rogers World	6/6057	8/1/16	RNAV (RNP) Z RWY 35L, Amdt 1A.
15–Sep–16 ...	OK	Oklahoma City	Will Rogers World	6/6058	8/1/16	RNAV (RNP) Z RWY 35R, Amdt 2A.
15–Sep–16 ...	OK	Oklahoma City	Will Rogers World	6/6060	8/1/16	RNAV (GPS) Y RWY 17R, Amdt 4A.
15–Sep–16 ...	OK	Oklahoma City	Will Rogers World	6/6061	8/1/16	RNAV (GPS) Y RWY 35L, Amdt 4.
15–Sep–16 ...	OK	Oklahoma City	Will Rogers World	6/6063	8/1/16	RNAV (GPS) Y RWY 35R, Amdt 3A.
15–Sep–16 ...	OK	Oklahoma City	Will Rogers World	6/6065	8/1/16	RNAV (GPS) RWY 13, Amdt 3A.
15–Sep–16 ...	MI	Pellston	Pellston Rgnl Airport Of Emmet County.	6/6120	7/1/16	RNAV (GPS) RWY 5, Orig-A.
15–Sep–16 ...	MI	Pellston	Pellston Rgnl Airport Of Emmet County.	6/6124	7/1/16	VOR RWY 23, Amdt 16A.
15–Sep–16 ...	MI	Pellston	Pellston Rgnl Airport Of Emmet County.	6/6125	7/1/16	ILS OR LOC RWY 32, Amdt 11B.
15–Sep–16 ...	IN	New Castle	New Castle-Henry Co Muni	6/6134	8/3/16	NDB OR GPS RWY 9, Amdt 5B.
15–Sep–16 ...	MO	Cuba	Cuba Muni	6/7516	8/2/16	RNAV (GPS) RWY 36, Orig-B.
15–Sep–16 ...	MO	Cuba	Cuba Muni	6/7517	8/2/16	RNAV (GPS) RWY 18, Orig-A.
15–Sep–16 ...	TX	Georgetown	Georgetown Muni	6/7534	8/2/16	RNAV (GPS) RWY 11, Orig.
15–Sep–16 ...	TX	Georgetown	Georgetown Muni	6/7535	8/2/16	RNAV (GPS) RWY 29, Orig.
15–Sep–16 ...	MI	Midland	Jack Barstow	6/7673	7/1/16	RNAV (GPS) RWY 24, Amdt 1.
15–Sep–16 ...	WA	Spokane	Felts Field	6/9348	8/3/16	RNAV (GPS)-A, Amdt 1.
15–Sep–16 ...	WA	Spokane	Felts Field	6/9349	8/3/16	RNAV (GPS) RWY 4L, Amdt 1B.
15–Sep–16 ...	CA	Van Nuys	Van Nuys	6/9350	8/1/16	VOR–A, Amdt 4B.
15–Sep–16 ...	CA	Bishop	Bishop	6/9356	8/3/16	Takeoff Minimums and Obstacle DP, Amdt 3A.
15–Sep–16 ...	CA	San Diego	Montgomery Field	6/9364	8/1/16	ILS OR LOC RWY 28R, Amdt 4A.
15–Sep–16 ...	CA	San Diego	Montgomery Field	6/9365	8/1/16	RNAV (GPS) RWY 28R, Amdt 1A.
15–Sep–16 ...	PR	Aguadilla	Rafael Hernandez	6/9687	8/3/16	VOR/DME OR TACAN RWY 26, Orig-B

[FR Doc. 2016–20296 Filed 8–24–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31089; Amdt. No. 3707]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures (ODPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective August 25, 2016. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 25, 2016.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops–M30, 1200 New Jersey Avenue SE., West Bldg., Ground Floor, Washington, DC 20590–0001.

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedure Standards Branch (AFS–420), Flight Technologies and Programs Divisions, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd. Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) Telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14 of the Code of Federal Regulations, Part 97 (14 CFR part 97), by establishing, amending, suspending, or removes SIAPS, Takeoff Minimums and/or ODPS. The complete regulatory description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part § 97.20. The applicable FAA forms are FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, and 8260–15B when required by an entry on 8260–15A.

The large number of SIAPs, Takeoff Minimums and ODPs, their complex nature, and the need for a special format make publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPs, Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure, and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPS, Takeoff Minimums and/or ODPS as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as Amended in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPs and Takeoff Minimums and ODPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26,1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on July 29, 2016.

John S. Duncan,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or removing Standard Instrument Approach Procedures and/or Takeoff Minimums and Obstacle Departure Procedures effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 15 September 2016

Troy, AL, Troy Muni Airport at N Kenneth Campbell Field, ILS OR LOC RWY 7, Amdt 11
Troy, AL, Troy Muni Airport at N Kenneth Campbell Field, RNAV (GPS) RWY 7, Amdt 3
Troy, AL, Troy Muni Airport at N Kenneth Campbell Field, RNAV (GPS) RWY 25, Amdt 3
El Monte, CA, San Gabriel Valley, NDB OR GPS–C, Amdt 1A
El Monte, CA, San Gabriel Valley, VOR OR GPS–A, Amdt 7A
El Monte, CA, San Gabriel Valley, VOR or GPS–B, Amdt 3A
Half Moon Bay, CA, Half Moon Bay, Takeoff Minimums and Obstacle DP, Amdt 1
Hanford, CA, Hanford Muni, Takeoff Minimums and Obstacle DP, Amdt 1A
Hayward, CA, Hayward Executive, LOC/DME RWY 28L, Amdt 3B
Hayward, CA, Hayward Executive, RNAV (GPS) RWY 28L, Amdt 1B
Hayward, CA, Hayward Executive, VOR/DME–A, Amdt 3A
Livermore, CA, Livermore Muni, RNAV (GPS) RWY 25R, Amdt 1
Napa, CA, Napa County, RNAV (GPS) Z RWY 36L, Amdt 1B
Napa, CA, Napa County, VOR RWY 6, Amdt 13B

Oakland, CA, Metropolitan Oakland Intl, ILS OR LOC RWY 12, ILS RWY 12 (SA CAT I), Amdt 8A
Oakland, CA, Metropolitan Oakland Intl, RNAV (GPS) Y RWY 28L, Amdt 4A
Oakland, CA, Metropolitan Oakland Intl, RNAV (GPS) Y RWY 30, Amdt 5A
Oakland, CA, Metropolitan Oakland Intl, RNAV (RNP) Z RWY 30, Amdt 3A
Oakland, CA, Metropolitan Oakland Intl, VOR RWY 10R, Amdt 10A
Oakland, CA, Metropolitan Oakland Intl, VOR/DME RWY 28L, Amdt 12A, CANCELED
Palm Springs, CA, Bermuda Dunes, Takeoff Minimums and Obstacle DP, Amdt 1
Palm Springs, CA, Jacqueline Cochran Rgnl, Takeoff Minimums and Obstacle DP, Amdt 3
Palo Alto, CA, Palo Alto, VOR/DME RWY 31, Orig-F
Paso Robles, CA, Paso Robles Muni, RNAV (GPS) RWY 19, Amdt 1A
Paso Robles, CA, Paso Robles Muni, VOR RWY 19, Amdt 4C
Paso Robles, CA, Paso Robles Muni, VOR–B, Amdt 3A
Petaluma, CA, Petaluma Muni, VOR RWY 29, Orig-D
San Jose, CA, Norman Y Mineta San Jose Intl, ILS OR LOC RWY 30L, ILS RWY 30L (SA CAT I), ILS RWY 30L (SA CAT II), Amdt 25A
Santa Rosa, CA, Charles M Schulz-Sonoma County, ILS OR LOC/DME RWY 32, Amdt 19A
Santa Rosa, CA, Charles M Schulz-Sonoma County, RNAV (GPS) RWY 2, Orig-D
Santa Rosa, CA, Charles M Schulz-Sonoma County, RNAV (GPS) RWY 32, Amdt 1B
Santa Rosa, CA, Charles M Schulz-Sonoma County, VOR/DME RWY 14, Amdt 3B
Holyoke, CO, Holyoke, RNAV (GPS) RWY 14, Orig-F
Trinidad, CO, Perry Stokes, NDB–A, Amdt 3, CANCELED
Trinidad, CO, Perry Stokes, RNAV (GPS) RWY 21, Orig
Trinidad, CO, Perry Stokes, RNAV (GPS)-B, Amdt 1, CANCELED
Trinidad, CO, Perry Stokes, Takeoff Minimums and Obstacle DP, Amdt 5
Trinidad, CO, Perry Stokes, TRINIDAD ONE Graphic DP
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, ILS OR LOC RWY 14, Amdt 6B
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, ILS OR LOC RWY 32, Amdt 8B
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, RNAV (GPS) RWY 4, Amdt 2B
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, RNAV (GPS) RWY 14, Amdt 3B
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, RNAV (GPS) RWY 32, Amdt 3B
Sarasota/Bradenton, FL, Sarasota/Bradenton Intl, VOR RWY 14, Amdt 18B
St Petersburg-Clearwater, FL, St Pete-Clearwater Intl, ILS OR LOC RWY 18L, ILS RWY 18L (CAT II), Amdt 22B, CANCELED
St Petersburg-Clearwater, FL, St Pete-Clearwater Intl, ILS OR LOC RWY 36, Orig
St Petersburg-Clearwater, FL, St Pete-Clearwater Intl, ILS OR LOC RWY 36R, Amdt 4, CANCELED
St Petersburg Clearwater, FL, St Pete-Clearwater Intl, RNAV (GPS) RWY 18, Orig
St Petersburg-Clearwater, FL, St Pete-Clearwater Intl, RNAV (GPS) RWY 18L, AMDT 1C, CANCELED
St Petersburg-Clearwater, FL, St Pete-Clearwater Intl, RNAV (GPS) RWY 36, Orig
St Petersburg-Clearwater, FL, St Pete-Clearwater Intl, RNAV (GPS) RWY 36R, Amdt 2C, CANCELED
St Petersburg-Clearwater, FL, St Pete-Clearwater Intl, VOR RWY 36, Orig
St Petersburg-Clearwater, FL, St Pete-Clearwater Intl, VOR/DME RWY 36R, Amdt 2, CANCELED
St Petersburg, FL Albert Whitted, RNAV (GPS) RWY 7, Amdt 3D
Albany, GA, Southwest Georgia Rgnl, ILS OR LOC RWY 4, Amdt 11A
Albany, GA, Southwest Georgia Rgnl, LOC BC RWY 22, Amdt 8A
Albany, GA, Southwest Georgia Rgnl, VOR OR TACAN RWY 16, Amdt 27A
Gainesville, GA, Lee Gilmer Memorial, ILS OR LOC/DME RWY 5, Orig-A
Gainesville, GA, Lee Gilmer Memorial, NDB RWY 5, Amdt 5B
Champaign/Urbana, IL, University of Illinois-Willard, Takeoff Minimums and Obstacle DP, Amdt 1
Ulysses, KS, Ulysses, NDB RWY 12, Amdt 4
Ulysses, KS, Ulysses, RNAV (GPS) RWY 12, Amdt 2
Ulysses, KS, Ulysses, RNAV (GPS) RWY 17, Amdt 1B
Ulysses, KS, Ulysses, RNAV (GPS) RWY 30, Amdt 1A
Ulysses, KS, Ulysses, RNAV (GPS) RWY 35, Amdt 1A
Hyannis, MA, Barnstable Muni-Boardman/Polando Field, ILS OR LOC RWY 15, Amdt 5
Hyannis, MA, Barnstable Muni-Boardman/Polando Field, ILS OR LOC RWY 24, Amdt 19
Trenton, MO, Trenton Muni, NDB RWY 18, Amdt 7D
Trenton, MO, Trenton Muni, NDB RWY 36, Amdt 10B
Baker, MT, Baker Muni, RNAV (GPS) RWY 13, Orig
Deer Lodge, MT, Deer Lodge-City-County, RNAV (GPS)–A, Amdt 1
Grand Island, NE., Central Nebraska Rgnl, ILS OR LOC RWY 35, Amdt 9F
Grand Island, NE., Central Nebraska Rgnl, LOC/DME BC RWY 17, Amdt 9E
Grand Island, NE., Central Nebraska Rgnl, VOR RWY 13, Amdt 19C
Grand Island, NE., Central Nebraska Rgnl, VOR RWY 17, Amdt 24B
Grand Island, NE., Central Nebraska Rgnl, VOR/DME RWY 31, Amdt 8A
Grand Island, NE., Central Nebraska Rgnl, VOR/DME RWY 35, Amdt 15B
Harvard, NE., Harvard State, RNAV (GPS) RWY 17, Orig-B
Ogdensburg, NY, Ogdensburg Intl, LOC RWY 27, Amdt 4
Ogdensburg, NY, Ogdensburg Intl, RNAV (GPS) RWY 27, Amdt 1
Ogdensburg, NY, Ogdensburg Intl, Takeoff Minimums and Obstacle DP, Amdt 2
Clinton, OK, Clinton Rgnl, RNAV (GPS) RWY 17, Amdt 3
Clinton, OK, Clinton Rgnl, RNAV (GPS) RWY 35, Amdt 4
Clinton, OK, Clinton Rgnl, VOR/DME–A, Orig, CANCELED
Elk City, OK, Elk City Rgnl Business, RNAV (GPS) RWY 17, Amdt 2
Elk City, OK, Elk City Rgnl Business, RNAV (GPS) RWY 35, Amdt 2
Weatherford, OK, Thomas P Stafford, RNAV (GPS) RWY 35, Amdt 3
John Day, OR, Grant County Rgnl/Ogilvie, Takeoff Minimums and Obstacle DP, Amdt 2
Harrisburg, PA, Harrisburg Intl, ILS OR LOC RWY 31, Amdt 1C
Harrisburg, PA, Harrisburg Intl, Takeoff Minimums and Obstacle DP, Amdt 8A
Indiana, PA, Indiana County/Jimmy Stewart Fld/, RNAV (GPS) RWY 11, Orig
Indiana, PA, Indiana County/Jimmy Stewart Fld/, RNAV (GPS) RWY 29, Orig
Indiana, PA, Indiana County/Jimmy Stewart Fld/, Takeoff Minimums and Obstacle DP, Orig
Indiana, PA, Indiana County/Jimmy Stewart Fld/, Takeoff Minimums and Obstacle DP, Amdt 2, CANCELED
Reading, PA, Reading Rgnl/Carl A Spaatz Field, RNAV (GPS) RWY 36, Orig-B
Clarksville, TN, Outlaw Field, LOC RWY 35, Amdt 6
Clarksville, TN, Outlaw Field, RNAV (GPS) RWY 17, Amdt 1
Clarksville, TN, Outlaw Field, RNAV (GPS) RWY 35, Amdt 1
Trenton, TN, Gibson County, RNAV (GPS) RWY 1, Amdt 1

Trenton, TN, Gibson County, RNAV (GPS) RWY 19, Amdt 1
Canadian, TX, Hemphill County, RNAV (GPS) RWY 4, Amdt 2
Galveston, TX, Scholes Intl at Galveston, ILS OR LOC RWY 14, Amdt 12B
Galveston, TX, Scholes Intl at Galveston, VOR RWY 14, Amdt 4B
Wheeler, TX, Wheeler Muni, RNAV (GPS) RWY 17, Orig-A, CANCELED
Wheeler, TX, Wheeler Muni, RNAV (GPS) RWY 35, Orig-A, CANCELED
Wheeler, TX, Wheeler Muni, RNAV (GPS)-A, Orig
Wheeler, TX, Wheeler Muni, RNAV (GPS)-B, Orig
Wheeler, TX, Wheeler Muni, VOR/DME–A, Amdt 2, CANCELED
Chehalis, WA, Chehalis-Centralia, RNAV (GPS) RWY 16, Amdt 2
La Crosse, WI, La Crosse Rgnl, RNAV (GPS) RWY 18, Orig-D
La Crosse, WI, La Crosse Rgnl, RNAV (GPS) RWY 36, Orig-C
Hulett, WY, Hulett Muni, RNAV (GPS) RWY 13, Orig

[FR Doc. 2016–20293 Filed 8–24–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31091; Amdt. No. 3709]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures (ODPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective August 25, 2016. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 25, 2016.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops–M30, 1200 New Jersey Avenue SE., West Bldg., Ground Floor, Washington, DC 20590–0001.
2. The FAA Air Traffic Organization Service Area in which the affected airport is located;
3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,
4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedure Standards Branch (AFS–420), Flight Technologies and Programs Divisions, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd. Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) Telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14 of the Code of Federal Regulations, Part 97 (14 CFR part 97), by establishing, amending, suspending, or removes SIAPS, Takeoff Minimums and/or ODPS. The complete regulatory description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part § 97.20. The applicable FAA forms are FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, and 8260–15B when required by an entry on 8260–15A.

The large number of SIAPs, Takeoff Minimums and ODPs, their complex nature, and the need for a special format make publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the types of SIAPs, Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure, and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPS, Takeoff Minimums and/or ODPS as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as Amended in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPs and Takeoff Minimums and ODPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26,1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on August 12, 2016.

John S. Duncan,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) is amended by establishing, amending, suspending, or removing Standard Instrument Approach Procedures and/or Takeoff Minimums and Obstacle Departure Procedures effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 15 September 2016

Clanton, AL, Chilton County, NDB OR GPS RWY 26, Orig-A, CANCELED
Clanton, AL, Chilton County, RNAV (GPS) RWY 8, Orig
Clanton, AL, Chilton County, RNAV (GPS) RWY 26, Orig
Clanton, AL, Chilton County, Takeoff Minimums and Obstacle DP, Amdt 1
Palm Springs, CA, Bermuda Dunes, BERMUDA DUNES ONE Graphic DP
San Diego/El Cajon, CA, Gillespie Field, LOC–D, Amdt 11C
Torrance, CA, Zamperini Field, ILS OR LOC RWY 29R, Amdt 3
Torrance, CA, Zamperini Field, RNAV (GPS) RWY 11L, Amdt 1
Torrance, CA, Zamperini Field, RNAV (GPS) RWY 29R, Amdt 1
Torrance, CA, Zamperini Field, VOR RWY 11L, Amdt 16
Van Nuys, CA, Van Nuys, ILS Z RWY 16R, Amdt 1
Miami, FL, Miami Intl, ILS OR LOC RWY 9, Amdt 10
St Petersburg-Clearwater, FL, St Pete-Clearwater Intl, ILS OR LOC RWY 18, ILS RWY 18 (SA CAT I), ILS RWY 18 (CAT II), Orig
Albany, GA, Southwest Georgia Rgnl, RNAV (GPS) RWY 4, Amdt 1A
Albany, GA, Southwest Georgia Rgnl, RNAV (GPS) RWY 16, Amdt 1A
Albany, GA, Southwest Georgia Rgnl, RNAV (GPS) RWY 22, Amdt 1A
Albany, GA, Southwest Georgia Rgnl, RNAV (GPS) RWY 34, Amdt 2A
Lawrenceville, GA, Gwinnett County—Briscoe Field, RNAV (GPS) RWY 25, Orig-D
Thomson, GA, Thomson-McDuffie County, Takeoff Minimums and Obstacle DP, Amdt 2
Chicago, IL, Chicago O'Hare Intl, ILS OR LOC RWY 14L, ILS RWY 14L (CAT II & III), Amdt 29D, CANCELED
Chicago, IL, Chicago O'Hare Intl, ILS OR LOC RWY 15, Amdt 30D
Chicago, IL, Chicago O'Hare Intl, ILS OR LOC RWY 32R, Amdt 21E, CANCELED
Chicago, IL, Chicago O'Hare Intl, RNAV (GPS) RWY 14L, Amdt 1F, CANCELED
Chicago, IL, Chicago O'Hare Intl, RNAV (GPS) RWY 15, Amdt 2D
Chicago, IL, Chicago O'Hare Intl, RNAV (GPS) RWY 32R, Amdt 1B, CANCELED
Chicago, IL, Chicago O'Hare Intl, Takeoff Minimums and Obstacle DP, Amdt 20A
Nantucket, MA, Nantucket Memorial, ILS OR LOC RWY 6, Amdt 2
Nantucket, MA, Nantucket Memorial, ILS OR LOC RWY 24, Amdt 16
Nantucket, MA, Nantucket Memorial, RNAV (GPS) RWY 6, Amdt 1
Nantucket, MA, Nantucket Memorial, RNAV (GPS) RWY 24, Amdt 1
Battle Creek, MI, W K Kellog, ILS OR LOC RWY 23R, Amdt 19
Battle Creek, MI, W K Kellog, NDB RWY 23R, Amdt 19
Raymond, MS, John Bell Williams, ILS OR LOC RWY 12, Amdt 1C
Raymond, MS, John Bell Williams, NDB RWY 12, Amdt 3B, CANCELED
Aurora, NE., Aurora Muni—Al Potter Field, VOR–A, Amdt 6B
Chappell, NE., Billy G Ray Field, NDB OR GPS RWY 30, Amdt 2B
Sidney, NE., Sidney Muni/Lloyd W Carr Field, RNAV (GPS) RWY 13, Amdt 2A
Sidney, NE., Sidney Muni/Lloyd W Carr Field, RNAV (GPS) RWY 31, Amdt 2A
York, NE., York Muni, NDB RWY 17, Amdt 6A
York, NE., York Muni, NDB RWY 35, Amdt 4B
Newark, NJ, Newark Liberty Intl, RNAV (GPS) Z RWY 22L, Amdt 2
Newark, NJ, Newark Liberty Intl, RNAV (RNP) Y RWY 22L, Amdt 1
Albuquerque, NM, Double Eagle II, ILS OR LOC RWY 22, Amdt 3
Albuquerque, NM, Double Eagle II, RNAV (GPS) RWY 4, Orig
Albuquerque, NM, Double Eagle II, RNAV (GPS) RWY 22, Amdt 1
Newport, OR, Newport Muni, VOR RWY 34, Amdt 2
Harrisburg, PA, Harrisburg Intl, VOR RWY 31, Amdt 2B
Highmore, SD, Highmore Muni, RNAV (GPS) RWY 13, Orig
Highmore, SD, Highmore Muni, RNAV (GPS) RWY 31, Orig
Highmore, SD, Highmore Muni, Takeoff Minimums and Obstacle DP, Orig
Brownsville, TX, Brownsville/South Padre Island Intl, ILS OR LOC RWY 13, Orig
Brownsville, TX, Brownsville/South Padre Island Intl, ILS OR LOC RWY 13R, Amdt 1B, CANCELED
Brownsville, TX, Brownsville/South Padre Island Intl, LOC BC RWY 31, Orig
Brownsville, TX, Brownsville/South Padre Island Intl, LOC BC RWY 31L, Amdt 11E, CANCELED
Brownsville, TX, Brownsville/South Padre Island Intl, RNAV (GPS) RWY 13, Orig
Brownsville, TX, Brownsville/South Padre Island Intl, RNAV (GPS) RWY 13R, Amdt 2A, CANCELED
Brownsville, TX, Brownsville/South Padre Island Intl, RNAV (GPS) RWY 17, Orig-A, CANCELED
Brownsville, TX, Brownsville/South Padre Island Intl, RNAV (GPS) RWY 18, Orig
Brownsville, TX, Brownsville/South Padre Island Intl, VOR/DME RNAV OR GPS RWY 35, Amdt 3A, CANCELED
Haskell, TX, Haskell Muni, NDB OR GPS RWY 18, Amdt 2B, CANCELED
Haskell, TX, Haskell Muni, RNAV (GPS)-A, ORIG
Houston, TX, Ellington, ILS OR LOC RWY 17R, Amdt 6B
Houston, TX, George Bush Intercontinental/Houston, ILS OR LOC RWY 27, ILS RWY 27 (SA CAT I), ILS RWY 27 (CAT II), ILS RWY 27 (CAT III), Amdt 11

Houston, TX, George Bush Intercontinental/Houston, RNAV (GPS) Z RWY 27, Amdt 5
Houston, TX, George Bush Intercontinental/Houston, RNAV (RNP) Y RWY 27, Amdt 2
Franklin, VA, Franklin Muni-John Beverly Rose, RNAV (GPS) RWY 9, Amdt 1B
Franklin, VA, Franklin Muni-John Beverly Rose, RNAV (GPS) RWY 27, Amdt 1B
Franklin, VA, Franklin Muni-John Beverly Rose, Takeoff Minimums and Obstacle DP, Amdt 2A
Lawrenceville, VA, Lawrenceville/Brunswick Muni, RNAV (GPS) RWY 18, Orig-A, CANCELED
Lawrenceville, VA, Lawrenceville/Brunswick Muni, RNAV (GPS) RWY 36, Orig-A, CANCELED
Lawrenceville, VA, Lawrenceville/Brunswick Muni, RNAV (GPS)-A, Orig
Lawrenceville, VA, Lawrenceville/Brunswick Muni, RNAV (GPS)-B, Orig
West Point, VA, Middle Peninsula Rgnl, LOC RWY 10, Orig
West Point, VA, Middle Peninsula Rgnl, RNAV (GPS) RWY 10, Amdt 1A
West Point, VA, Middle Peninsula Rgnl, RNAV (GPS) RWY 28, Orig-D
West Point, VA, Middle Peninsula Rgnl, VOR–A, Amdt 4A

RESCINDED: On August 4, 2016 (81 FR 51339), the FAA published an Amendment in Docket No. 31085, Amdt No. 3703 to Part 97 of the Federal Aviation Regulations. The following entry, effective September 15, 2016, is hereby rescinded in its entirety:

Arcata/Eureka, CA, Arcata, VOR/DME RWY 1, Amdt 8A, CANCELED
Bishop, CA, Bishop, VOR/DME OR GPS–B, Amdt 4B, CANCELED
Ruston, LA, Ruston Rgnl, NDB RWY 36, Orig-A, CANCELED
Corvallis, OR, Corvallis Muni, Takeoff Minimums and Obstacle DP, Amdt 6A
Morgantown, WV, Morgantown Muni-Walter L Bill Hart Fld, VOR–A, Amdt 13, CANCELED

RESCINDED: On August 4, 2016 (81 FR 51332), the FAA published an Amendment in Docket No. 31087, Amdt No. 3705 to Part 97 of the Federal Aviation Regulations. The following entry, effective September 15, 2016, is hereby rescinded in its entirety:

Kokomo, IN, Kokomo Muni, VOR RWY 23, Amdt 20, CANCELED
Sidney, MT, Sidney-Richland Muni, NDB RWY 1, Amdt 3, CANCELED

[FR Doc. 2016–20295 Filed 8–24–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31090; Amdt. No. 3708]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide for the safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective August 25, 2016. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 25, 2016.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops–M30, 1200 New Jersey Avenue SE., West Bldg., Ground Floor, Washington, DC 20590–0001;

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Navigation Products, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA).

For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center online at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedure Standards Branch (AFS–420) Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This rule amends Title 14, Code of Federal Regulations, Part 97 (14 CFR part 97) by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (NFDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained on FAA form documents is unnecessary.

This amendment provides the affected CFR sections, and specifies the SIAPs and Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff Minimums and ODPs as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and Takeoff Minimums and ODP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP and Takeoff Minimums and ODP as modified by FDC permanent NOTAMs.

The SIAPs and Takeoff Minimums and ODPs, as modified by FDC permanent NOTAM, and contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for these SIAP and Takeoff Minimums and ODP amendments require making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making these SIAPs effective in less than 30 days.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air traffic control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on July 29, 2016.

John S. Duncan,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, Title 14, Code of Federal regulations, Part 97, (14 CFR part 97), is amended by amending Standard Instrument Approach Procedures and Takeoff Minimums and ODPs, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33, 97.35 [Amended]

■ 2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

* * * *Effective Upon Publication*

AIRAC date	State	City	Airport	FDC No.	FDC date	Subject
15–Sep–16	OH	Port Clinton	Erie-Ottawa Intl	6/1559	7/21/16	RNAV (GPS) RWY 27, Amdt 1A.
15–Sep–16	OH	Port Clinton	Erie-Ottawa Intl	6/1560	7/21/16	NDB RWY 27, Amdt 14A.
15–Sep–16	MN	Alexandria	Chandler Field	6/2704	7/21/16	ILS OR LOC RWY 31, Orig-C.
15–Sep–16	MS	Okolona	Okolona Muni-Richard Stovall Field.	6/3355	7/21/16	RNAV (GPS) RWY 18, Amdt 1.
15–Sep–16	MS	Okolona	Okolona Muni-Richard Stovall Field.	6/3390	7/21/16	RNAV (GPS) RWY 36, Amdt 1.
15–Sep–16	OH	Port Clinton	Erie-Ottawa Intl	6/5245	7/21/16	RNAV (GPS) RWY 9, Amdt 1.
15–Sep–16	AL	Troy	Troy Muni Airport At N Kenneth Campbell Field.	6/5673	7/21/16	RNAV (GPS) RWY 14, Amdt 1.
15–Sep–16	AL	Troy	Troy Muni Airport At N Kenneth Campbell Field.	6/5678	7/21/16	NDB RWY 7, Amdt 12.
15–Sep–16	AL	Troy	Troy Muni Airport At N Kenneth Campbell Field.	6/5681	7/21/16	RNAV (GPS) RWY 32, Amdt 1.
15–Sep–16	NC	New Bern	Coastal Carolina Regional	6/7249	7/21/16	ILS OR LOC RWY 4, Amdt 1.
15–Sep–16	OK	Tulsa	Richard Lloyd Jones Jr	6/7313	7/21/16	RNAV (GPS) RWY 1L, Orig.
15–Sep–16	OK	Tulsa	Richard Lloyd Jones Jr	6/7314	7/21/16	VOR/DME–A, Amdt 7.
15–Sep–16	IL	Moline	Quad City Intl	6/8934	7/21/16	RNAV (GPS) RWY 31, Amdt 1A.
15–Sep–16	FL	Tampa	Peter O Knight	6/9473	7/13/16	RNAV (GPS) RWY 22, Amdt 2A.
15–Sep–16	FL	Tampa	Peter O Knight	6/9474	7/13/16	RNAV (GPS) RWY 36, Amdt 2B.

[FR Doc. 2016–20290 Filed 8–24–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2016–0711]

Special Local Regulation; San Diego Maritime Museum Tall Ship Festival of Sail; San Diego Bay, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the special local regulations on the waters of San Diego Bay, California during the San Diego Maritime Museum Tall Ship Festival of Sail from 9:00 a.m. to 7:00 p.m. from September 2, 2016 to September 4, 2016. These special local regulations are necessary to provide for the safety of the participants, crew, spectators, sponsor vessels, and general users of the waterway. During the enforcement period, persons and vessels are prohibited from anchoring, blocking, loitering, or impeding this regulated parade route and mock gun battle area unless authorized by the Captain of the Port, or his designated representative.

DATES: The regulations in 33 CFR 100.1101 will be enforced from 9 a.m. through 7 p.m. from September 2, 2016 to September 4, 2016, for Item 15 in Table 1 of Section 100.1101.

FOR FURTHER INFORMATION CONTACT: If you have questions about this publication of enforcement, call or email Petty Officer Randolph Pahilanga, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone (619) 278–7656, email *D11MarineEventsSD@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulations in 33 CFR 100.1101 for the San Diego Maritime Museum Tall Ship Festival of Sail in San Diego Bay, CA in 33 CFR 100.1101, Table 1, Item 15 of that section from 9 a.m. until 7 p.m. from September 2, 2016 to September 4, 2016. This enforcement action is being taken to provide for the safety of life on navigable waterways during the parade and subsequent mock gun battles. The Coast Guard's regulation for recurring marine events within the San Diego Captain of the Port Zone identifies the regulated entities for this event. Under the provisions of 33 CFR 100.1101, persons and vessels are prohibited from anchoring, blocking, loitering, or impeding within this regulated parade route and mock gun battle area unless authorized by the Captain of the Port, or his designated representative. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

This document is issued under authority of 5 U.S.C. 552(a) and 33 CFR 100.1101. In addition to this document in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via the Local Notice to Mariners, Broadcast Notice to Mariners, and local advertising by the event sponsor.

If the Captain of the Port Sector San Diego or his designated representative determines that the regulated area need not be enforced for the full duration stated on this document, he or she may use a Broadcast Notice to Mariners or other communications coordinated with the event sponsor to grant general permission to enter the regulated area.

Dated: August 2, 2016.

J.R. Buzzella,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. 2016–20422 Filed 8–24–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2016–0730]

Special Local Regulation; San Diego Bayfair; Mission Bay, San Diego, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement regulation.

SUMMARY: The Coast Guard will enforce the special local regulations on the waters of Mission Bay, California during the San Diego Bayfair boat racing event from 7:00 a.m. to 6:00 p.m. from September 16, 2016 to September 18, 2016. These special local regulations are necessary to provide for the safety of the participants, crew, spectators, sponsor vessels, and general users of the waterway. During the enforcement period, persons and vessels are prohibited from anchoring, blocking, loitering, or impeding within this regulated area unless authorized by the Captain of the Port, or his designated representative.

DATES: The regulations in 33 CFR 100.1101 will be enforced from 7 a.m. through 6 p.m. from September 16, 2016 to September 18, 2016 for Item 12 in Table 1 of Section 100.1101.

FOR FURTHER INFORMATION CONTACT: If you have questions about this publication of enforcement, call or email Petty Officer Chelsea Zimmerman, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone (619) 278–7656, email *D11MarineEventsSD@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulations in 33 CFR 100.1101 for the San Diego Bayfair in Mission Bay, CA in 33 CFR 100.1101, Table 1, Item 12 of that section from 7 a.m. until 6 p.m. from September 16, 2016 through September 18, 2016. This enforcement action is being taken to provide for the safety of life on navigable waterways during the races. The Coast Guard's regulation for recurring marine events in the San Diego Captain of the Port Zone identifies the regulated entities for this event. Under the provisions of 33 CFR 100.1101, persons and vessels are prohibited from anchoring, blocking, loitering, or impeding within this regulated area of Mission Bay to include Fiesta Bay, the east side of Vacation Isle, and Crown Point shores unless authorized by the Captain of the Port, or his designated representative. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

This document is issued under authority of 5 U.S.C. 552(a) and 33 CFR 100.1101. In addition to this document in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via the Local Notice to Mariners, Broadcast Notice to Mariners, and local advertising by the event sponsor.

If the Captain of the Port Sector San Diego or his designated representative determines that the regulated area need not be enforced for the full duration stated on this document, he or she may use a Broadcast Notice to Mariners or other communications coordinated with the event sponsor to grant general permission to enter the regulated area.

Dated: August 10, 2016.

J.R. Buzzella,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. 2016–20426 Filed 8–24–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2016–0831]

Drawbridge Operation Regulation; Reynolds Channel, Nassau County, NY

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulation.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the Long Beach Bridge, mile 4.7, across Reynolds Channel, at Nassau County, New York. This temporary deviation is necessary to facilitate public safety during a public event, the Annual Fireworks Display.

DATES: This deviation is effective from 9:30 p.m. on September 2, 2016 to 10:30 p.m. on September 3, 2016.

ADDRESSES: The docket for this deviation, USCG–2016–0831, is available at *http://www.regulations.gov.* Type the docket number in the "SEARCH" box and click "SEARCH". Click on Open Docket Folder on the line associated with this deviation.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email Ms. Judy K. Leung-Yee, Project Officer, First Coast Guard District, telephone (212) 514–4330, email *Judy.K.Leung-Yee@uscg.mil.*

SUPPLEMENTARY INFORMATION: The bridge owner, Nassau County Department of Public Works, requested this temporary deviation from the normal operating schedule to facilitate a public event, the Annual Fireworks Display.

The Long Beach Bridge, mile 4.7, across Reynolds Channel has a vertical clearance in the closed position of 22 feet at mean high water and 24 feet at mean low water. The existing bridge operating regulations are found at 33 CFR 117.799(g).

Reynolds Channel is transited by commercial and recreational traffic.

Under this temporary deviation, the Long Beach Bridge may remain in the closed position between 9:30 p.m. and 10:30 p.m. on September 2, 2016 (rain date: September 3, 2016 between 9:30 p.m. and 10:30 p.m.).

Vessels able to pass under the bridge in the closed position may do so at anytime. The bridges will not be able to open for emergencies and there are no immediate alternate routes for vessels to pass.

The Coast Guard will also inform the users of the waterways through our Local and Broadcast Notices to Mariners of the change in operating schedule for the bridge so that vessels can arrange their transits to minimize any impact caused by the temporary deviation.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: August 22, 2016.

C.J. Bisignano,

Supervisory Bridge Management Specialist, First Coast Guard District.

[FR Doc. 2016–20372 Filed 8–24–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2016–0817]

Drawbridge Operation Regulation; Columbia River, Portland, OR and Vancouver, WA

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulation.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the Interstate 5 (I–5) Bridges across the Columbia River, mile 106.5, between Portland, Oregon, and Vancouver, Washington. The deviation is necessary to facilitate the movement and safety of pedestrians on the I–5 Bridges. This deviation allows the bridges to remain in the closed-to-navigation position during the Hands Across the Bridge event.

DATES: This deviation is effective from 10 a.m. to 1 p.m. on September 5, 2016.

ADDRESSES: The docket for this deviation, [USCG–2016–0XXX] is available at *http://www.regulations.gov.* Type the docket number in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this deviation.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email Mr. Steven Fischer, Bridge Administrator, Thirteenth Coast Guard District; telephone 206–220–7282, email *d13-pf-d13bridges@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Oregon Department of Transportation has requested that the Interstate 5 (I–5) Bridges across the Columbia River remain closed to vessel traffic to facilitate heavier than normal pedestrian traffic associated with Hands Across the Bridges event. The I–5 Bridges cross the Columbia River at mile 106.5, and provide three designated navigation channels with vertical clearances ranging from 39 to 72 feet above Columbia River Datum 0.0 while the lift spans are in the closed-to-navigation position. The normal operating schedule for the I–5 Bridges is 33 CFR 117.869. This deviation period is from 10 a.m. to 1 p.m. on September 5, 2016. The deviation allows the lift spans of the I–5 Bridges to remain in the closed-to-navigation position, and need not open for maritime traffic during this period. The bridges shall operate in accordance with 33 CFR 117.869 at all other times. Waterway usage on this part of the Columbia River includes vessels ranging from commercial tug and tow vessels to recreational pleasure craft.

Vessels able to pass under the bridges in the closed positions may do so at anytime. The bridges will be able to open for emergencies and there is no immediate alternate route for vessels to pass. The Coast Guard will also inform the users of the waterways through our Local and Broadcast Notices to Mariners of the change in operating schedule for the bridge so that vessels can arrange their transits to minimize any impact caused by the temporary deviation.

In accordance with 33 CFR 117.35(e), the drawbridges must return to their regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: August 19, 2016.

Steven M. Fischer,

Bridge Administrator, Thirteenth Coast Guard District.

[FR Doc. 2016–20368 Filed 8–24–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2016–0756]

RIN 1625–AA87

Security Zone; U.S. Navy/U.S. Coast Guard Assets Demonstration in Conjunction With Fleet Week San Diego, San Diego Bay; San Diego, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary 750-foot radius security zone on the navigable waters of the U.S. in San Diego Bay, San Diego, CA, in support of Fleet Week San Diego on September 10, 2016. This action is necessary to provide for the safety and security of U.S. Navy and U.S Coast Guard surface and aerial assets, crews, and support personnel who will be performing mission capability and search and rescue demonstrations. Unauthorized persons and vessels will be prohibited from entering into or remaining in the security zone unless authorized by the Captain of the Port San Diego or his designated representative.

DATES: This rule is effective from 11 a.m. until 2 p.m. on September 10, 2016.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, type USCG–2016–0756 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email LT Robert Cole, Waterways Management, U.S. Coast Guard Sector San Diego, Coast Guard; telephone 619–278–7656, email *D11MarineEventsSD@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR	Code of Federal Regulations
COTP	Captain of the Port
DHS	Department of Homeland Security
NPRM	Notice of Proposed Rulemaking
SMIB	Safety Marine Information Broadcast
U.S.C.	United States Code
VHF	Very High Frequency

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest."

We did not publish a Notice of Proposed Rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a NPRM thirty days in advance of its publication in the **Federal Register**, because publishing an NPRM would be impracticable. The availability of assets and the desired location of the demonstration could not be confirmed in time to allow for a notice and comment period. Delay in this temporary rule's effective date would be detrimental to the immediate need to ensure the safety and security of U.S. Navy and U.S. Coast Guard assets and personnel.

We are issuing this rule, and under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making it effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because of the immediate need to ensure the security of the U.S. Navy and U.S. Coast Guard assets and personnel.

III. Legal Authority and Need for Rule

The legal basis and authorities for this temporary rule are found in 33 U.S.C. 1231, 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5, and 165.30; and Department of Homeland Security Delegation No. 0170.1, which collectively authorize the Coast Guard to propose, establish, and define regulatory security zones. The Coast Guard is establishing a temporary security zone on the navigable waters of the San Diego Bay to ensure the safety and security of U.S. Navy and U.S. Coast Guard assets and personnel in San Diego, CA, on September 10, 2016.

IV. Discussion of the Rule

The Coast Guard is establishing a temporary security zone that will be enforced from 11:00 a.m. to 2:00 p.m. on September 10, 2016. This security zone will encompass the waters within a 750-foot radius centered at the following coordinate: 32°43′18″ N., 117°12′11″ W. The purpose of the security zone is intended to protect the U.S. Navy and U.S. Coast Guard surface and aerial assets, crews, and support personnel who will be performing mission capability and search and rescues demonstrations in San Diego, CA. Persons and vessels will be prohibited from entering into or remaining in the security zone unless authorized by the COTP San Diego or his designated representative. Prior to the event and during the enforcement of the event, the Coast Guard will issue a SMIB via VHF Channel 16/22A.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive Orders related to rulemaking. Below we summarize our analyses based on these statutes and executive orders.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a "significant regulatory action," under E.O. 12866. Accordingly, it has not been reviewed by the Office of Management and Budget. This determination is based on the size, location and limited duration of the security zone. This zone impacts a small designated area of the San Diego bay for a very limited period. Furthermore, vessel traffic can safely transit around the security zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: the owners or operators of vessels intending to transit or anchor in the impacted portion of the San Diego Bay from 11:00 a.m. through 2:00 p.m. on September 10, 2016.

This security zone will not have a significant economic impact on a substantial number of small entities for the following reasons: Vessel traffic can pass safely around the zone, and the zone will be enforced for a short duration of time. The Coast Guard will issue a SMIB to mariners via VHF Channel 16 and 22A before the security zone is enforced.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and determined that it is consistent with the fundamental federalism principles and preemption requirements described in E.O. 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves establishment of a security zone lasting only 3 hours on the navigable waters of San Diego Bay. It is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5, 165.30; Department of Homeland Security Delegation No. 0170.01.

■ 2. Add § 165.T11–797 to read as follows:

§ 165.T11–797 Security Zone; San Diego Bay; San Diego, CA.

(a) *Location.* The following area is a security zone: The limits of the security zone will include all the navigable waters within a 750-foot radius centered at the following coordinate: 32°43′18″ N., 117°12′11″ W.

(b) *Definitions.* The following definition applies to this section: *Designated representative* means any commissioned, warrant, or petty officer of the Coast Guard on board Coast Guard, Coast Guard Auxiliary, or local, state, or federal law enforcement vessels that have been authorized to act on the behalf of the Captain of the Port.

(c) *Regulations.* (1) Under the general regulations in 33 CFR 165.33, entry into, or movement within this zone is prohibited unless authorized by the Captain of the Port San Diego or his designated representative.

(2) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or his designated representative.

(3) Upon being hailed by U.S. Coast Guard or designated patrol personnel by siren, radio, flashing light or other means, the operator of a vessel shall proceed as directed.

(4) The Coast Guard may be assisted by other federal, state, or local agencies in patrol and notification of the regulation.

(5) Vessel operators desiring to enter or operate within this security zone shall contact the Captain of the Port or his designated representative via VHF channel 16 to obtain permission to do so.

(d) *Enforcement period.* This section will be enforced from 11:00 a.m. to 2:00 p.m. on September 10, 2016.

Dated: August 10, 2016.

J.R. Buzzella,

Captain, U.S. Coast Guard, Captain of the Port San Diego.

[FR Doc. 2016–20432 Filed 8–24–16; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2016–0377; FRL–9951–34–Region 8]

Approval and Promulgation of Air Quality Implementation Plans; State of Wyoming; Emission Inventory Rule for 2008 Ozone NAAQS and Revisions to Incorporation by Reference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving State Implementation Plan (SIP) revisions

submitted by the State of Wyoming on July 1, 2014. The submittal requests SIP revisions to the State's Incorporation by reference section as well as an administrative change in section numbering. The submittal also includes the addition of a section establishing requirements for the submittal of emission inventories from facilities or sources located in an ozone nonattainment area.

DATES: This rule is effective on October 24, 2016 without further notice, unless the EPA receives adverse comments by September 26, 2016. If adverse comments are received, the EPA will publish a timely withdrawal of this direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2016–0377, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. For additional information on submission of CBI, please see Section II.A below. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Chris Dresser, Air Program, U.S. Environmental Protection Agency, Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6385, *dresser.chris@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Why is the EPA using a direct final rule?

The EPA is publishing this rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment. However, in the "Proposed Rules" section of today's **Federal Register**, we are publishing a separate document that will serve as the proposed rule to approve the SIP revisions if adverse comments are received on this direct final rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

If the EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. We anticipate that we would address all public comments in any subsequent final rule based on the proposed rule. The EPA will consider all comments received, if any, and take appropriate action in accordance with such comments.

II. What should I consider as I prepare my comments for the EPA?

A. *Submitting CBI.* Do not submit this information to the EPA through *www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to the EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

B. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

III. Analysis of the State Submittal

In a July 1, 2014 submittal, Wyoming requested revisions affecting the SIP involving Chapter 8, Nonattainment Area Regulations, Section 5, Ozone nonattainment emission inventory rule, and Section 10, Incorporation by reference. Chapter 8, Section 5 of Wyoming's SIP was previously the Incorporation by reference section due to the fact that on August 15, 2013 the EPA approved a revision that reorganized Chapter 8, and added Section 5 (78 FR 49685). In response to the July 1, 2014 submittal, the EPA is now approving a change that will make Section 10 the Incorporation by reference section instead of Section 5. In addition to this administrative change of the Wyoming Incorporation by reference section, the State is seeking to update the language by changing the date of the citation in this Incorporation by reference section from 2011 to 2012. The EPA approves these revisions.

Moreover, since Chapter 8, Section 5 is now vacant, Wyoming is seeking to amend its SIP by adding a new emission inventory provision to Section 5. The Ozone Nonattainment Emission Inventory Rule is a new rule to establish requirements for the submittal of emissions inventories from facilities or sources located in an ozone nonattainment area pursuant to the requirements of the Clean Air Act (CAA), Section 182. The EPA approves this revision.

IV. What action is the EPA taking today?

The EPA is taking direct final action to approve the SIP revisions submitted by the State of Wyoming on July 1, 2014. The EPA is approving the proposed SIP revisions as a direct final action without prior proposal because the agency views the revisions as noncontroversial and anticipates no adverse comments. However, in the Proposed Rules section of today's **Federal Register** publication, the EPA is publishing a separate document that will serve as the proposal to approve the SIP revisions if adverse comments are filed. This rule will be effective October 24, 2016 without further notice unless the Agency receives adverse comments by September 26, 2016. If the EPA receives adverse comments, the EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. The EPA will address all public comments in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if the EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, the EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

V. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the Wyoming rules described in the amendments to 40 CFR part 52 set forth later. Therefore, these materials have been approved by the EPA for inclusion in the State Implementation Plan, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under Sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.[1] The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and/or at the EPA Region 8 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

VI. Statutory and Executive Orders Review

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state actions, provided that they meet the criteria of the Clean Air Act. Accordingly, this direct final action merely approves a state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact in a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. Section 801 *et seq,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. Section 804(2).

Under Section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 24, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that the EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See Section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds, Incorporation by reference.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: August 11, 2016.

Debra Thomas,

Deputy Regional Administrator, Region 8.

40 CFR part 52 is amended to read as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart ZZ—Wyoming

■ 2. Section 52.2620, the table in paragraph (c) is amended under "Chapter 08. Non-attainment Area Regulations." by revising the entry for "Section 05" and by adding, after "Section 05", a new entry for "Section 10" to read as follows:

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[1] 62 FR 27968 (May 22, 1997).

§ 52.2620 Identification of plan

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(c) * * *

Rule no.	Rule title	State effective date	EPA effective date	Final rule citation/date	Comments
*	*	*	*	*	*
Chapter 08. Non-attainment Area Regulations					
*	*	*	*	*	*
Section 05	Ozone nonattainment emission inventory rule.	11/22/2013	10/24/2016.	[Insert **Federal Register** citation]. 8/25/2016.	
Section 10	Incorporation by reference	11/22/2013	10/24/2016.	[Insert **Federal Register** citation]. 8/25/2016.	
*	*	*	*	*	*

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[FR Doc. 2016–20315 Filed 8–24–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2015–0449; FRL–9951–25–Region 4]

Air Plan Approval; North Carolina; Regional Haze Progress Report

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a State Implementation Plan (SIP) revision submitted by the State of North Carolina through the North Carolina Division of Air Quality (NC DAQ) on May 31, 2013. North Carolina's May 31, 2013, SIP revision (Progress Report) addresses requirements of the Clean Air Act (CAA or Act) and EPA's rules that require each state to submit periodic reports describing progress towards reasonable progress goals (RPGs) established for regional haze and a determination of the adequacy of the state's existing SIP addressing regional haze (regional haze plan). EPA is approving North Carolina's Progress Report on the basis that it addresses the progress report and adequacy determination requirements for the first implementation period for regional haze.

DATES: This rule will be effective September 26, 2016.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2015–0449. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information may not be publicly available, *i.e.,* Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Sean Lakeman, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Mr. Lakeman can be reached by phone at (404) 562–9043 and via electronic mail at *lakeman.sean@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Under the Regional Haze Rule,[1] each state was required to submit its first implementation plan addressing regional haze visibility impairment to EPA no later than December 17, 2007. *See* 40 CFR 51.308(b). North Carolina submitted its regional haze plan on that date, and like many other states subject to the Clean Air Interstate Rule (CAIR), relied on CAIR to satisfy best available retrofit technology (BART) requirements for emissions of sulfur dioxide (SO_2) and nitrogen oxides (NO_X) from electric generating units (EGUs) in the State. On June 7, 2012, EPA finalized a limited disapproval of North Carolina's December 17, 2007, regional haze plan submission because of deficiencies arising from the State's reliance on CAIR to satisfy certain regional haze requirements. *See* 77 FR 33642. In a separate action taken on June 27, 2012, EPA finalized a limited approval of North Carolina's December 17, 2007, regional haze plan submission, as meeting some of the applicable regional haze requirements as set forth in sections 169A and 169B of the CAA and in 40 CFR 51.300–308. *See* 77 FR 38185. On October 31, 2014, the State submitted a regional haze plan revision to correct the deficiencies identified in the June 27, 2012, limited disapproval by replacing reliance on CAIR with reliance on the State's Clean Smokestacks Act (CSA) as an alternative to NO_X and SO_2 BART for BART-eligible EGUs formerly subject to CAIR. EPA approved that SIP revision on May 24, 2016, resulting in a full approval of North Carolina's regional haze plan. *See* 81 FR 32652.

Each state is also required to submit a progress report in the form of a SIP revision every five years that evaluates progress towards the RPGs for each mandatory Class I Federal area within the state and for each mandatory Class I Federal area outside the state which may be affected by emissions from within the state. *See* 40 CFR 51.308(g). Each state is also required to submit, at the same time as the progress report, a determination of the adequacy of its existing regional haze plan. *See* 40 CFR 51.308(h). The first progress report was due five years after submittal of the initial regional haze plan.

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[1] Located in 40 CFR part 51, subpart P.

On May 31, 2013, as required by 40 CFR 51.308(g), NC DAQ submitted to EPA, in the form of a revision to North Carolina's SIP, a report on progress made towards the RPGs for Class I areas in the State and for Class I areas outside the State that are affected by emissions from sources within the State. This submission also includes a negative declaration pursuant to 40 CFR 51.308(h)(1) that the State's regional haze plan is sufficient in meeting the requirements of the Regional Haze Rule and revised RPGs for the five Class I areas within the State based on updated modeling. In a notice of proposed rulemaking (NPRM) published on June 15, 2016 (81 FR 38986), EPA proposed to approve North Carolina's Progress Report on the basis that it satisfies the requirements of 40 CFR 51.308(g) and 51.308(h) now that EPA has fully approved the State's regional haze plan. No comments were received on the June 15, 2016, proposed rulemaking. The details of North Carolina's submittal and the rationale for EPA's actions are further explained in the NPRM. *See* 81 FR 38986 (June 15, 2016).

II. Final Action

EPA is finalizing approval of North Carolina's Regional Haze Progress Report SIP revision, submitted by the State on May 31, 2013, as meeting the applicable regional haze requirements set forth in 40 CFR 51.308(g) and 51.308(h). EPA also is finalizing approval of the updated RPGs for North Carolina's Class I areas.

III. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 24, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxide, Volatile organic compounds.

Dated: August 15, 2016.

Heather McTeer Toney,

Regional Administrator, Region 4.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart II—North Carolina

■ 2. Section 52.1770(e), is amended by adding an entry for "May 2013 Regional Haze Progress Report" at the end of the table to read as follows:

§ 52.1770 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED NORTH CAROLINA NON-REGULATORY PROVISIONS

Provision	State effective date	EPA Approval date	**Federal Register** citation	Explanation
*	*	*	*	*
May 2013 Regional Haze Progress Report	5/31/2013	8/25/2016	[Insert citation of publication].	Includes updated reasonable progress goals for North Carolina's Class I areas.

[FR Doc. 2016–20309 Filed 8–24–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2016–0169; FRL–9951–29–Region 5]

Air Plan Approval; Indiana; RACM Determination for Indiana Portion of the Cincinnati-Hamilton 1997 Annual $PM_{2.5}$ Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving the reasonably available control measures (RACM) and reasonably available control technology (RACT) analysis that Indiana submitted as part of its attainment plan for the 1997 fine particulate matter ($PM_{2.5}$) standard, in accordance with Indiana's request dated February 11, 2016. The RACM/RACT analysis addresses RACM and RACT for the Indiana portion of the Cincinnati-Hamilton nonattainment area for the 1997 $PM_{2.5}$ standard. EPA is not acting on the portions of the State Implementation Plan (SIP) submission that are unrelated to RACM/RACT. Other portions of the attainment plan have either been addressed or will be addressed in future rulemaking actions.

DATES: This direct final rule will be effective October 24, 2016, unless EPA receives adverse comments by September 26, 2016. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2016–0169 at *http://www.regulations.gov* or via email to *aburano.douglas@epa.gov.* For comments submitted at *Regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Joseph Ko, Environmental Engineer, Attainment, Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–7947, *ko.joseph@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

I. Background
II. What are EPA's actions?
III. What is EPA's analysis of the State's RACM submittal?
IV. What action is EPA taking?
V. Statutory and Executive Order Reviews

I. Background

On July 18, 1997, EPA promulgated the first national ambient air quality standards (NAAQS) for $PM_{2.5}$. EPA promulgated an annual standard of 15 micrograms per cubic meter (μg/m^3) (based on a 3-year average of annual mean $PM_{2.5}$ concentrations) and a 24-hour standard of 65 μg/m^3 (based on a 3-year average of the 98th percentile of 24-hour concentrations). *See* 62 FR 38652. On December 17, 2004, based on 2001–2003 monitoring data, EPA designated the Cincinnati-Hamilton OH-KY-IN area (the Cincinnati-Hamilton area) as nonattainment for the annual standard for fine particles, and these designations became effective on April 5, 2005. *See* 70 FR 944. On July 3, 2008, Indiana requested that EPA redesignate as attainment its portion of the Cincinnati-Hamilton area, showing that existing permanent and enforceable controls would provide for timely attainment of the 1997 $PM_{2.5}$ standard by the attainment deadline of April 5, 2010. On September 29, 2011, based on 2007–2009 monitoring data, EPA made a "clean data determination" and determination of attainment, indicating that the entire area was attaining the 1997 $PM_{2.5}$ NAAQS by its applicable attainment date. *See* 76 FR 60373. The clean data determination suspended all further planning SIP revision requirements.

As part of its action approving the redesignation of the Indiana and Ohio portions of the Cincinnati-Hamilton area to attainment, published on December 23, 2011, EPA found that the states of Ohio and Indiana had satisfied the remaining applicable requirements, including the requirement to submit an emission inventory in accordance with section 172(c)(3). *See* 76 FR 80253. The redesignation to attainment was based, in part, on EPA's longstanding interpretation that Subpart 1 nonattainment planning requirements, including RACM, are not "applicable" for purposes of Clean Air Act section 107(d)(3)(E)(ii) and (v) when an area is attaining the NAAQS and, therefore, need not be approved into the SIP before EPA can redesignate the area. *See* 76 FR 80258.

On July 14, 2015, the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) issued an opinion in *Sierra Club* v. *EPA,* 793 F.3d 656 (6th Cir. 2015), vacating EPA's redesignation of the Indiana and Ohio portions of the

Cincinnati-Hamilton area to attainment for the 1997 $PM_{2.5}$ NAAQS on the basis that EPA had not approved subpart 1 RACM for the area into the SIP.[1] The Court concluded that "a State seeking redesignation 'shall provide for the implementation' of RACM/RACT, even if those measures are not strictly necessary to demonstrate attainment with the $PM_{2.5}$ NAAQS. . . . If a State has not done so, EPA cannot 'fully approve[]' the area's SIP, and redesignation to attainment status is improper." *Sierra Club,* 793 F.3d at 670.

EPA is adhering to the Court's precedent within the jurisdiction of the Sixth Circuit, which does not include Indiana. Regardless, on February 11, 2016, Indiana requested that EPA act on the RACM/RACT analysis for its portion of the Cincinnati-Hamilton area from the earlier attainment plan SIP revision in order to eliminate any potential concern regarding the effect of the Sixth Circuit decision.

II. What are EPA's actions?

EPA is approving Indiana's requested SIP submission as providing for all reasonably available control measures, including reasonably available control technology, in accordance with the requirements of sections 172(c)(1) and 189(a)(1)(C). More detail on EPA's rationale is provided below.

III. What is EPA's analysis of the State's RACM submittal?

a. Subpart 1 and Subpart 4 RACM Requirements

RACM is required under both Subpart 1 and Subpart 4 of Part D of Title I of the CAA. *See* CAA section 172(c)(1) and section 189(a)(1)(C). Section 172(c)(1) requires that each attainment plan "provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from the existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology), and shall provide for attainment of the national primary ambient air quality standards." Similar language in section 189(a)(1)(C) requires RACM for $PM_{2.5}$ plans. EPA's current implementation guidance interprets RACM, including RACT, under section 172(c)(1) as measures that are both reasonably available and necessary to demonstrate attainment as expeditiously as practicable in the nonattainment area. *See* 40 CFR 51.1010(a).[2] A state must adopt, as RACM, measures that are reasonably available considering technical and economic feasibility if, considered collectively, they would advance the attainment date by one year or more. *See* 40 CFR 51.1010(b). EPA has also proposed implementation policy that applies a similar interpretation to RACM as required under section 189(a)(1)(C).

The $PM_{2.5}$ Implementation Rule (72 FR 20586) requires that the Subpart 1 RACM portion of the attainment plan SIP revision include the list of potential measures that a state considered and additional information sufficient to show that the state has met all requirements for the determination of what constitutes RACM in a specific nonattainment area. *See* 40 CFR 51.1010(a). Any measures that are necessary to meet these requirements that are not already either federally promulgated, part of the SIP, or otherwise creditable in SIPs must be submitted in enforceable form as part of a state's attainment plan SIP revision for the area. As discussed above, a clean data determination suspends the requirement for a $PM_{2.5}$ nonattainment area to submit an attainment plan SIP revision, including RACM, so long as the area continues to attain the $PM_{2.5}$ NAAQS. *See* 40 CFR 51.1004(c).

b. RACM Based Upon Attainment of the NAAQS

EPA is approving the portion of Indiana's July 3, 2008, requested attainment plan SIP revision that addresses Subpart 1 RACM for the State's portion of the Cincinnati-Hamilton area on the basis that it is attaining the 1997 Annual $PM_{2.5}$ NAAQS and, therefore, no additional emission reduction measures beyond the existing measures in the SIP are necessary to demonstrate attainment or would advance the area's attainment by one year or more. As noted above, EPA determined that the area met the standard by the April 5, 2010 attainment date. *See* 76 FR 60373. Indiana's submission therefore meets the requirements of section 172(c)(1) pursuant to 40 CFR 51.1010. Given the similarity of requirements under Subpart 4, the submission also meets the RACT/RACM requirements of section 189(a)(1)(C).

c. RACM Based Upon the State's Control Evaluation

Additionally, the portion of Indiana's July 3, 2008 requested attainment plan SIP revision that addresses Subpart 1 RACM for the State's portion of the Cincinnati-Hamilton area is approvable on the basis that the requested SIP revision demonstrates that no additional reasonably available controls would have advanced the attainment date projected therein.

Indiana determined that existing measures and measures planned for implementation by 2009 would result in the Cincinnati-Hamilton area attaining the 1997 $PM_{2.5}$ NAAQS by the attainment deadline of April 5, 2010. Air quality modeling conducted by Lake Michigan Air Directors Consortium (LADCO) indicated that the area would attain the annual NAAQS in 2009 based upon projected emissions reductions from sources within the area after 2005 (the base year of the nonattainment emissions inventory). As discussed in Chapter 6.0 of the July 3, 2008 SIP submission, the State considered the following existing federally enforceable measures in projecting the emissions inventory used for the 2009 modeling: Tier 2 vehicle standards; heavy-duty gasoline and diesel highway vehicle standards; large non-road diesel engine standards; non-road spark-ignition engines and recreational engines standards; nitrogen oxides (NO_X) SIP call; and the Clean Air Interstate Rule (CAIR). Indiana adopted the NO_X SIP Call in 2001, and beginning in 2004, this rule accounted for a reduction of approximately 31% of total NO_X emissions in Indiana compared to previous uncontrolled years. Indiana adopted a state rule in response to CAIR in 2006 which included an annual and seasonal NO_X trading program, and an annual SO_2 trading program.

In addition to the federally enforceable measures mentioned above, Indiana also considered further Federal and statewide control measures that, once implemented, would further reduce emissions, but that were not included in the modeling demonstration. The Portable Fuel Container (Gas Can) Controls, and the Small Non-Road Engine Rules were considered as additional Federal controls that would reduce emissions. The Gas Can Controls Rule was issued on February 26, 2007 (71 FR 15830), and it was expected to significantly reduce volatile organic compounds (VOC) emissions. The Small Non-Road Engine Rule was proposed on April 17, 2007, and it was expected to result in a 70% reduction in hydrocarbon and NO_X emissions and a 20% reduction in carbon monoxide from new engines' exhaust, as well as a 70% reduction in evaporative emissions. The following Indiana statewide VOC controls rules were considered: Consumer and Commercial Products Rule (326 IAC 8), Architectural and Industrial Maintenance Coatings Rule (326 IAC 8–14), Automobile Refinishing Operations Rule (326 IAC 8–10), and Stage I Vapor Recovery Rule (326 IAC 8–4).

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[1] The Court issued its initial decision in the case on March 18, 2015, and subsequently issued an amended opinion on July 14 after appeals for rehearing en banc and panel rehearing had been filed. The amended opinion revised some of the legal aspects of the Court's analysis of the relevant statutory provisions (section 107(d)(3)(E)(ii) and section 172(c)(1)) but the overall holding of the opinion was unaltered. On March 28, 2016, the Supreme Court denied a petition for certiorari from Ohio requesting review of the Sixth Circuit's decision.

[2] Subpart 1 RACM requirements at 40 CFR 51.1010 were not at issue in the D.C. Circuit's remand of the $PM_{2.5}$ implementation rule in the January 2013 *Natural Resources Defense Council* v. *EPA* decision and are therefore not subject to the Court's remand. *Cf. NRDC* v. *EPA,* 571 F.3d 1245, 1252–53 (D.C. Cir. 2009) (upholding a substantially similar interpretation of Subpart 1 RACM in the context of ozone implementation regulations).

In Indiana's RACM analysis, which appears in chapter 7.0 of the July 3, 2008, SIP submission, the State discusses its evaluation of sources of $PM_{2.5}$ and its precursors within the Indiana portion of the Cincinnati-Hamilton area and its determination that these sources were meeting Subpart 1 RACM levels of emissions control. As discussed above, a state must show that all Subpart 1 RACM (including RACT for stationary sources) necessary to demonstrate attainment as expeditiously as practicable have been adopted and must consider the cumulative impact of implementing available measures to determine whether a particular emission reduction measure or set of measures is required to be adopted as RACM. Potential measures that are reasonably available considering technical and economic feasibility must be adopted as RACM if, considered collectively, they would advance the attainment date by one year or more.

Based on the emissions inventory and other information, the State identified the categories of sources that should be evaluated for controls. These categories include permitted stationary sources; gasoline dispensing facilities; on-road mobile sources; non-road and stationary internal combustion engines; open burning; and home heating with wood.

Indiana, in conjunction with LADCO, conducted attainment test modeling that showed that the Indiana portion of the Cincinnati-Hamilton area would attain the current annual $PM_{2.5}$ NAAQS by 2009, one year before the attainment date deadline of 2010. Indiana evaluated candidate control measures for feasibility, cost effectiveness, and the ability to implement them in the set time frame. No additional measures were needed to demonstrate attainment in an expeditious fashion, since the conducted attainment test modeling showed that the area would attain the fine particles NAAQS by 2009. Indiana's attainment demonstration was validated by quality assured monitoring data at the end of 2009. Therefore, EPA is approving the existing measures as meeting the requirements of RACM/RACT. *See* 72 FR 20586.

In addition to Indiana's modeling demonstration of expeditious attainment and confirmatory monitoring data, the primary source for both direct $PM_{2.5}$ and its precursor emissions for Indiana's portion of the Cincinnati-Hamilton area (Tanners Creek power plant owned by American Electric Power) was permanently retired on June 1, 2015. As a result of its retirement, direct $PM_{2.5}$ and $PM_{2.5}$ precursor emissions in the Indiana portion of the area have decreased significantly, further improving air quality, above and beyond what Indiana demonstrated as necessary to maintain attainment.

EPA has reviewed the State's RACM/RACT analysis and discussion in Indiana's attainment plan SIP revision, and agrees with the State's conclusion that no other reasonably available measures were available or necessary to attain or advance attainment of the standard.

IV. What action is EPA taking?

EPA is approving the RACM/RACT portion of Indiana's Cincinnati-Hamilton area attainment plan SIP revision as providing adequate RACM/RACT consistent with the provisions of 40 CFR 51.1010(b), because Indiana has demonstrated that no further control measures would advance the attainment date in the area.

We are publishing this action without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comments. However, in the proposed rules section of this **Federal Register** publication, we are publishing a separate document that will serve as the proposal to approve the state plan if relevant adverse written comments are filed. This rule will be effective October 24, 2016 without further notice unless we receive relevant adverse written comments by September 26, 2016. If we receive such comments, we will withdraw this action before the effective date by publishing a subsequent document that will withdraw the final action. All public comments received will then be addressed in a subsequent final rule based on the proposed action. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. If we do not receive any comments, this action will be effective October 24, 2016.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an

Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 24, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: August 9, 2016.

Robert A. Kaplan,

Acting Regional Administrator, Region 5.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 2. Section 52.776 is amended by adding paragraph (y) to read as follows:

§ 52.776 Control strategy: Particulate matter.

* * * * *

(y) Approval-By submittal dated July 3, 2008, Indiana demonstrated satisfaction of the requirements for reasonably available control measures for its portion of the Cincinnati-Hamilton OH-KY-IN area.

[FR Doc. 2016–20312 Filed 8–24–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R02–OAR–2016–0088; FRL–9951–24–Region 2]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants; Virgin Islands; Sewage Sludge Incinerators

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking direct final action to approve the Clean Air Act (CAA) section 111(d)/129 negative declaration for the Government of the United States Virgin Islands, for existing sewage sludge incinerator (SSI) units. This negative declaration certifies that existing SSI units subject to sections 111(d) and 129 of the CAA do not exist within the jurisdiction of United States Virgin Islands. The EPA is accepting the negative declaration in accordance with the requirements of the CAA.

DATES: This direct final rule will be effective October 24, 2016, without further notice, unless the EPA receives adverse comment by September 26, 2016. If EPA receives adverse comment, we will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R02–OAR–016–0088), to *http://www.regulations.gov*. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the Web, cloud, or other file sharing system).

For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets*.

FOR FURTHER INFORMATION CONTACT: Edward J. Linky, Environmental Protection Agency, Air Programs Branch, 290 Broadway, New York, New York 10007–1866 at 212–637–3764 or by email at *Linky.Edward@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document "we," "us," or "our" refer to the EPA. This section provides additional information by addressing the following:

I. Background
II. Analysis of State Submittal
III. Statutory and Executive Order Reviews

I. Background

The Clean Air Act (CAA) requires that state [1] regulatory agencies implement the emission guidelines and compliance times using a state plan developed under sections 111(d) and 129 of the CAA.

The general provisions for the submittal and approval of state plans are codified in 40 CFR part 60, subpart B and 40 CFR part 62, subpart A. Section 111(d) establishes general requirements and procedures on state plan submittals for the control of designated pollutants.

Section 129 requires emission guidelines to be promulgated for all categories of solid waste incineration units, including SSI units. Section 129 mandates that all plan requirements be at least as protective and restrictive as the promulgated emission guidelines. This includes fixed final compliance dates, fixed compliance schedules, and Title V permitting requirements for all affected sources. Section 129 also requires that state plans be submitted to the EPA within one year after the EPA's promulgation of the emission guidelines and compliance times.

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[1] Section 302(d) of the CAA includes the Virgin Islands in the definition of the term "State."

States have options other than submitting a state plan in order to fulfill their obligations under CAA sections 111(d) and 129. If a State does not have any existing Sewage Sludge Incineration (SSI) units for the relevant emissions guidelines, a letter can be submitted certifying that no such units exist within the State (*i.e.*, negative declaration) in lieu of a state plan.

The negative declaration exempts the State from the requirements of subpart B that would otherwise require the submittal of a CAA section 111(d)/129 plan.

On March 21, 2011 (76 FR 15372), the EPA established emission guidelines and compliance times for existing SSI units. The emission guidelines and compliance times are codified at 40 CFR 60, subpart MMMM.

In order to fulfill obligations under CAA sections 111(d) and 129, the Government of the United States Virgin Islands (USVI) Department of Planning and Natural Resources (DPNR) submitted a negative declaration letter to the EPA on December 1, 2015. As the USVI–DPNR has certified by letter that no SSI units exist, the submittal of this declaration exempts the Territory from the requirement to submit a state plan for existing SSI units.

II. Analysis of State Submittal

In this Direct Final action, the EPA is amending part 62 to reflect receipt of the negative declaration letter from the USVI–DPNR, certifying that there are no existing SSI units subject to 40 CFR part 60, subpart MMMM, in accordance with section 111(d) of the CAA.

If a designated facility (*i.e.*, existing SSI unit) is later found within USVI–DPNR's jurisdiction after publication of this **Federal Register** action, then the overlooked facility will become subject to the requirements of the Federal plan for that designated facility, including the compliance schedule. The Federal plan will no longer apply, if we subsequently receive and approve the section 111(d)/129 plan from the jurisdiction with the overlooked facility.

The EPA is publishing this direct final rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment. However, in the "Proposed Rules" section of this **Federal Register**, we are publishing a separate document that will serve as the proposed rule to approve the negative declaration if adverse comments are received on this direct final rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document. If the EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. We will address all public comments in any subsequent final rule based on the proposed rule.

III. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a 111(d)/129 plan submission that complies with the provisions of the Act and applicable Federal regulations. 40 CFR 62.04.

Thus, in reviewing 111(d)/129 plan submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. § 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. § 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. § 104–4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. § 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

This action does not have tribal implications as specified by Executive Order 13175. The section 111(d)/129 plan is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. Thus, Executive Order 13175 does not apply to this section.

The Congressional Review Act, 5 U.S.C. § 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. § 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 24, 2016.

Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 62

Environmental protection, Air pollution control, Administrative practice and procedure, Intergovernmental relations, Reporting and recordkeeping requirements, Sewage sludge incinerators.

Dated: August 8, 2016.

Judith A. Enck,

Regional Administrator, Region 2.

For the reasons stated in the preamble, EPA amends 40 CFR part 62 as set forth below:

PART 62—APPROVAL AND PROMULGATION OF STATE PLANS FOR DESIGNATED FACILITIES AND POLLUTANTS

■ 1. The authority citation for part 62 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart CCC—Virgin Islands

■ 2. Add an undesignated center heading and § 62.13357 to subpart CCC to read as follows:

Air Emissions From Existing Sewage Sludge Incineration Units Constructed on or Before October 14, 2010

§ 62.13357 Identification of plan—negative declaration.

Letter from the Virgin Islands Department of Planning and Natural Resources, submitted December 1, 2015 to EPA Regional Administrator Judith A. Enck, certifying that there are no existing Sewage Sludge Incinerator units in the Territory of the United States Virgin Islands subject to 40 CFR part 60, subpart MMMM.

[FR Doc. 2016–20307 Filed 8–24–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2015–0811; FRL–9949–03]

Natamycin; Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of the biochemical pesticide natamycin [6,11,28-Trioxatricyclo [22.3.1.05'7]octacosa-8,14,16,18,20-pentaene-25-carboxylic acid, 22-[(3-amino-3,6-dideoxy-p-Dmannopyranosyl)oxy]-1,3,26-trihydroxy-12-methyl-10-oxo-, (1R,3S,5R,7R,8E,12R,14E,16E,18E,20E, 22R,24S,25R,26S)-] in or on citrus, pome, stone fruit crop groups, avocado, kiwi, mango and pomegranates when used in accordance with label directions and good agricultural practices. DSM Food Specialties, B.V., P.O. Box 1, 2600 MA Delft, The Netherlands (c/o Keller and Heckman, LLP, 1001 G St. NW., Washington, DC 20001) submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of natamycin in or on citrus, pome, stone fruit crop groups, avocado, kiwi, mango and pomegranate when used in accordance with label directions and good agricultural practices.

DATES: This regulation is effective August 25, 2016. Objections and requests for hearings must be received on or before October 24, 2016, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2015–0811, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Robert McNally, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *BPPDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2015–0811 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before October 24, 2016. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2015–0811 by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Background and Statutory Findings

In the **Federal Register** of April 25, 2016 (81 FR 24044) (FRL–9944–86), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 5F8407) by Keller and Heckman, LLP, 1001 G St. NW., Washington, DC 2001 on behalf of

DSM Food Specialties, B.V., P.O. Box 1, 2600 MA Delft, The Netherlands. The petition requested that 40 CFR part 180 be amended by establishing an exemption from the requirement of a tolerance for residues of natamycin in or on citrus, pome, stone fruit crop groups, avocado, kiwi, mango, and pomegranates, when used in facilities as a post-harvest fungistat to control certain fungal diseases. That document referenced a summary of the petition prepared by the petitioner, DSM Food Specialties, which is available in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is "safe." Section 408(c)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Pursuant to FFDCA section 408(c)(2)(B), in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in FFDCA section 408(b)(2)(C), which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . ."Additionally, FFDCA section 408(b)(2)(D) requires that the Agency consider "available information concerning the cumulative effects of a particular pesticide's residues" and "other substances that have a common mechanism of toxicity."

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides. Second, EPA examines exposure to the pesticide through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings.

III. Toxicological Profile

Consistent with FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness and reliability, and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

A. Overview of Natamycin

Natamycin is a naturally occurring compound derived from the common soil microorganisms *Streptomyces natalensis, Streptomyces lydicus,* and *Streptomyces chattanoogensis.* Natamycin was originally discovered in *Streptomyces natalensis* in South Africa in the early 1950s, and was subsequently discovered to also occur naturally in North America in *Streptomyces lydicus* and *Streptomyces chattanoogensis.* It is commercially produced by a submerged oxygen-based fermentation of *Streptomyces natalensis, Streptomyces lydicus,* or *Streptomyces chattanoogensis.* Natamycin has been used as a food preservative worldwide for over 40 years and is approved as a food additive/preservative by the European Union, the World Health Organization, and individual countries including New Zealand and Australia for use as a fungistat to suppress mold on cheese, meats and sausage. In the United States, natamycin is approved by the Food and Drug Administration (FDA) as a direct food additive/preservative for the inhibition of mold and yeast on the surface of cheeses (21 CFR 172.155) and as an additive to the feed and drinking water of broiler chickens to retard the growth of specific molds (21 CFR 573.685). Natamycin is also FDA approved for use as a treatment to suppress fungal eye infections such as blepharitis, conjunctivitis, and keratitis.

As a biochemical pesticide active ingredient, natamycin is already approved for use as a fungistat to prevent and control the germination of mold and yeast spores in the growth media of mushrooms produced in enclosed mushroom production facilities (77 FR 29543), and to control fungal growth post-harvest on pineapples treated indoors (79 FR 75068). Natamycin has a non-toxic mode of action, has no effects on fungal mycelia, and development of antibiotic resistance to natamycin has not been reported during its entire history of use. See the document entitled, "Federal Food, Drug, and Cosmetic Act (FFDCA) Considerations for Natamycin" (June 16, 2016), available in the docket for this action.

B. Biochemical Pesticide Toxicology Data Requirements

All applicable mammalian toxicology data requirements supporting the petition to amend the existing tolerance exemption by adding use as a fungicide post-harvest, indoors, on citrus, pome, stone fruit crop groups, avocado, kiwi, mango, and pomegranates have been fulfilled. No toxic endpoints were established, and no significant toxicological effects were observed in any of the acute toxicity studies. In addition, studies submitted indicate that natamycin is not genotoxic, has no subchronic toxic effects, and is not a developmental toxicant. There are no known effects on endocrine systems via oral, dermal, or inhalation routes of exposure. For a summary of the data upon which EPA relied, and its human health risk assessment based on that data, please refer to the document entitled, "Federal Food, Drug, and Cosmetic Act (FFDCA) Considerations for Natamycin" (June 16, 2016). This document, as well as other relevant information, is available in the docket for this action as described under **ADDRESSES.**

IV. Aggregate Exposures

In examining aggregate exposure, FFDCA section 408 directs EPA to consider available information concerning exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from ground water or surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

A. Dietary Exposure

The proposed use patterns may results in dietary exposure to natamycin, however, exposure is expected to be insignificant (see document entitled, "Federal Food, Drug, and Cosmetic Act (FFDCA) Considerations for Natamycin" (June 16, 2016), available in the docket for this action. No significant exposure via drinking water is expected; natamycin is applied indoors only. Some dietary exposure to natamycin might occur through other nonpesticidal sources as a result of its use as a food additive/preservative. Should exposure occur, however, minimal to no risk is expected for the general population, including infants and children, due to the low toxicity of natamycin as demonstrated in the data submitted and evaluated by the Agency, as fully explained in the document entitled, "Federal Food, Drug, and Cosmetic Act (FFDCA)

Considerations for Natamycin'' (June 16, 2016), available in the docket for this action.

B. Other Non-Occupational Exposure

Other non-occupational exposure (other than dietary) from pesticidal use is not expected because natamycin is not approved for residential uses. The active ingredient is applied directly to commodities and degrades rapidly. There may be some exposure to natamycin as a result of its use as treatment of infections, but minimal to no risk is expected for the general population, including infants and children, due to the low toxicity of natamycin as demonstrated in the data submitted and evaluated by the Agency, as fully explained in the document entitled, ''Federal Food, Drug, and Cosmetic Act (FFDCA) Considerations for Natamycin'' (June 16, 2016), available in the docket for this action.

V. Cumulative Effects From Substances With a Common Mechanism of Toxicity

Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found natamycin to share a common mechanism of toxicity with any other substances, and natamycin does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that natamycin does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

VI. Determination of Safety for U.S. Population, Infants, and Children

FFDCA section 408(b)(2)(C) provides that, in considering the establishment of a tolerance or tolerance exemption for a pesticide chemical residue, EPA shall assess the available information about consumption patterns among infants and children, special susceptibly of infants and children to pesticide chemical residues, and the cumulative effects on infants and children of the residues and other substances with a common mechanism of toxicity. In addition, FFDCA section 408(b)(2)(C) provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the Food Quality Protection Act (FQPA) Safety Factor. In applying this provision, EPA either retains the default value of 10X, or uses a different additional or no safety factor when reliable data are available to support a different additional or no safety factor.

As part of its qualitative assessment, EPA evaluated the available toxicity and exposure data for natamycin and considered it validity, completeness, and reliability, as well as the relationship of this information to human risk. EPA considers the toxicity database to be complete and has identified no residual uncertainty with regard to prenatal and postnatal toxicity or exposure. No hazard was identified based on the available studies, as fully explained in the document entitled, ''Federal Food, Drug, and Cosmetic Act (FFDCA) Considerations for Natamycin'' (June 16, 2016), available in the docket for this action. Based upon its evaluation, EPA concludes that there are no threshold effects of concern to infants, children, or adults when natamycin is applied to mushrooms, in enclosed mushroom production facilities, and on pineapples, citrus, pome, stone fruit crop groups, avocado, kiwi, mango and pomegranates when used in accordance with label directions and good agricultural practices. As a result, EPA concludes that no additional margin of exposure (safety) is necessary.

VII. Other Considerations

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation. Further, residues are not expected on any other crops because natamycin will only be applied indoors to these particular crops.

VIII. Conclusions

Based on its assessment of natamycin, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to natamycin. Therefore, an amendment to the exemption of a tolerance is established for residues of natamycin in or on citrus, pome, stone fruit crop groups, avocado, kiwi, mango and pomegranates.

The Agency is issuing the exemption for residues of natamycin in or on citrus, pome, stone fruit crop groups, avocado, kiwi, mango and pomegranates instead of limiting this exemption to post-harvest indoor applications to citrus, pome, stone fruit crop groups, avocado, kiwi, mango and pomegranates because the restrictions are not relevant to the FFDCA safety finding for natamycin. Those limitations are related to the use of the pesticide and regulated under FIFRA.

IX. Statutory and Executive Order Reviews

This final rule establishes a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

X. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 19, 2016.

Robert C. McNally,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Revise § 180.1315 to read as follows:

§ 180.1315 Natamycin; exemption from the requirement of a tolerance.

An exemption from the requirement of a tolerance is established for the residues of natamycin in or on mushrooms, pineapples, citrus, pome, stone fruit crop groups, avocado, kiwi, mango, and pomegranates when used in accordance with label directions and good agricultural practices.

[FR Doc. 2016–20409 Filed 8–24–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 160322276–6276–01]

RIN 0648–XE741

International Fisheries; Western and Central Pacific Fisheries for Highly Migratory Species; Closure of Purse Seine Fishery in the ELAPS in 2016

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; fishery closure.

SUMMARY: NMFS announces that the purse seine fishery in the Effort Limit Area for Purse Seine, or ELAPS, will close as a result of reaching the 2016 limit on purse seine fishing effort in the ELAPS. This action is necessary for the United States to implement provisions of a conservation and management measure adopted by the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC or Commission) and to satisfy the obligations of the United States under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Convention), to which it is a Contracting Party.

DATES: Effective 00:00 on September 2, 2016 universal time coordinated (UTC), until 24:00 on December 31, 2016 UTC.

FOR FURTHER INFORMATION CONTACT: Tom Graham, NMFS Pacific Islands Regional Office, 808–725–5032.

SUPPLEMENTARY INFORMATION: U.S. purse seine fishing in the area of application of the Convention, or Convention Area, is managed, in part, under the Western and Central Pacific Fisheries Convention Implementation Act (16 U.S.C. 6901 *et seq.*). Regulations implementing the Act are at 50 CFR part 300, subpart O. On behalf of the Secretary of Commerce, NMFS promulgates regulations under the Act as may be necessary to carry out the obligations of the United States under the Convention, including implementation of the decisions of the Commission.

Pursuant to WCPFC Conservation and Management Measure 2015–01, NMFS issued regulations that established a limit of 1,828 fishing days that may be used by U.S. purse seine fishing vessels in the ELAPS in calendar year 2016 (see interim rule at 81 FR 33147, published May 25, 2016, codified at 50 CFR 300.223). The ELAPS consists of the areas of the U.S. exclusive economic zone and the high seas that are in the Convention Area between the latitudes of 20° N. and 20° S. (see definition at 50 CFR 300.211). A fishing day means any day in which a fishing vessel of the United States equipped with purse seine gear searches for fish, deploys a fish aggregating device (FAD), services a FAD, or sets a purse seine, with the exception of setting a purse seine solely for the purpose of testing or cleaning the gear and resulting in no catch (see definition at 50 CFR 300.211).

Based on data submitted in logbooks and other available information, NMFS expects that the limit of 1,828 fishing days in the ELAPS will be reached, and in accordance with the procedures established at 50 CFR 300.223(a), announces that the purse seine fishery in the ELAPS will be closed starting at 00:00 on September 2, 2016 UTC, and will remain closed until 24:00 on December 31, 2016 UTC. Accordingly, it shall be prohibited for any fishing vessel of the United States equipped with purse seine gear to be used for fishing in the ELAPS from 00:00 on September 2, 2016 UTC until 24:00 December 31, 2016 UTC, except that such vessels will not prohibited from bunkering in the ELAPS during that period (50 CFR 300.223(a)).

Classification

There is good cause under 5 U.S.C. 553(b)(B) to waive prior notice and opportunity for public comment on this action. Compliance with the notice and comment requirement would be impracticable and contrary to the public interest, since NMFS would be unable to ensure that the 2016 limit on purse seine fishing effort in the ELAPS is not exceeded. This action is based on the best available information on U.S. purse seine fishing effort in the ELAPS. The action is necessary for the United States to comply with its obligations under the Convention and is important for the conservation and management of bigeye tuna, yellowfin tuna, and skipjack tuna in the western and central Pacific Ocean. For the same reasons, there is good cause under 5 U.S.C. 553(d)(3) to establish an effective date less than 30 days after the date of publication of this notice.

This action is required by 50 CFR 300.223(a) and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 6901 *et seq.*

Dated: August 22, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–20420 Filed 8–24–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 120403249–2492–02]

RIN 0648–XE829

Snapper-Grouper Fishery of the South Atlantic; 2016 Recreational Accountability Measure and Closure for South Atlantic Golden Tilefish

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS implements accountability measures (AMs) for the golden tilefish recreational sector in the exclusive economic zone (EEZ) of the South Atlantic for the 2016 fishing year through this temporary rule. NMFS estimates recreational landings of golden tilefish in 2016 have exceeded the recreational annual catch limit (ACL). Therefore, NMFS closes the golden tilefish recreational sector in the South Atlantic EEZ on August 27, 2016. This closure is necessary to protect the golden tilefish resource.

DATES: This rule is effective 12:01 a.m., local time, August 27, 2016, until 12:01 a.m., local time, January 1, 2017.

FOR FURTHER INFORMATION CONTACT: Mary Vara, NMFS Southeast Regional Office, telephone: 727–824–5305, email: *mary.vara@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic includes golden tilefish and is managed under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The FMP was prepared by the South Atlantic Fishery Management Council and is implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

The recreational ACL for golden tilefish is 3,019 fish. In accordance with regulations at 50 CFR 622.193(a)(2)(i), if recreational landings of golden tilefish reach the recreational ACL, the Assistant Administrator for NOAA Fisheries (AA) will file a notification with the Office of the Federal Register to close the recreational sector for the remainder of the fishing year. Landings data from the NMFS Southeast Fisheries Science Center in 2016 indicate that the golden tilefish recreational ACL has been exceeded. Therefore, this temporary rule implements an AM to close the golden tilefish recreational sector of the snapper-grouper fishery for the remainder of the 2016 fishing year. As a result, the recreational sector for golden tilefish in the South Atlantic EEZ will be closed effective 12:01 a.m., local time August 27, 2016.

During the closure, the bag and possession limits for golden tilefish in or from the South Atlantic EEZ are zero. The recreational sector for golden tilefish will reopen on January 1, 2017, the beginning of the 2017 recreational fishing season.

Classification

The Regional Administrator for the NMFS Southeast Region has determined this temporary rule is necessary for the conservation and management of South Atlantic golden tilefish and is consistent with the Magnuson-Stevens Act and other applicable laws.

This action is taken under 50 CFR 622.193(a)(2)(i) and is exempt from review under Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act because the temporary rule is issued without opportunity for prior notice and comment.

This action responds to the best scientific information available. The AA finds that the need to immediately implement this action to close the recreational sector for golden tilefish constitutes good cause to waive the requirements to provide prior notice and opportunity for public comment on this temporary rule pursuant to 5 U.S.C. 553(b)(B), because such procedures are unnecessary and contrary to the public interest. Such procedures are unnecessary because the AMs established by Regulatory Amendment 12 to the FMP (77 FR 61295, October 9, 2012) have already been subject to notice and comment. All that remains is to notify the public of the recreational closure for golden tilefish for the remainder of the 2016 fishing year. Prior notice and opportunity for comment are contrary to the public interest because of the need to immediately implement this action to protect the golden tilefish resource. Time required for notice and public comment would allow for continued recreational harvest and further exceedance of the recreational ACL.

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 22, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–20412 Filed 8–22–16; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 130312235–3658–02]

RIN 0648–XE824

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Resources of the South Atlantic; Trip Limit Reduction

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; trip limit reduction.

SUMMARY: NMFS reduces the commercial trip limit for vermilion snapper in or from the exclusive economic zone (EEZ) of the South Atlantic to 500 lb (227 kg), gutted weight, 555 lb (252 kg), round weight. This trip limit reduction is necessary to protect the South Atlantic vermilion snapper resource.

DATES: This rule is effective 12:01 a.m., local time, August 28, 2016, until 12:01 a.m., local time, January 1, 2017.

FOR FURTHER INFORMATION CONTACT: Mary Vara, NMFS Southeast Regional Office, telephone: 727–824–5305, email: *mary.vara@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery in the South Atlantic includes vermilion snapper and is managed under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The South Atlantic Fishery Management Council prepared the FMP. The FMP is implemented by NMFS under the authority of the Magnuson-Stevens Fishery

Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

The commercial ACL (commercial quota) for vermilion snapper in the South Atlantic is divided into two 6-month time periods, January through June, and July through December. For the July 1 through December 31, 2016, fishing season, the commercial quota is 388,703 lb (176,313 kg), gutted weight, 431,460 lb (195,707 kg), round weight (50 CFR 622.190(a)(4)(ii)(D)). As specified in 50 CFR 622.190(a)(4)(iii), any unused portion of the commercial quota from the January through June 2016, fishing season would be added to the commercial quota for the July through December 2016, fishing season. However, in 2016, there was no unused commercial quota for the January through June period as the commercial sector reached its quota during the first 6-month period. Accordingly, the commercial sector was closed on March 29, 2016, through June 30, 2016 (81 FR 16095, March 25, 2016).

Under 50 CFR 622.191(a)(6)(ii), NMFS is required to reduce the commercial trip limit for vermilion snapper from 1,000 lb (454 kg), gutted weight, 1,110 lb (503 kg), round weight, when 75 percent of the fishing season commercial quota is reached or projected to be reached, by filing a notification to that effect with the Office of the Federal Register, as established by Regulatory Amendment 18 to the FMP (78 FR 47574, August 6, 2013). The reduced commercial trip limit is 500 lb (227 kg), gutted weight, 555 lb (252 kg), round weight. Based on current information, NMFS has determined that 75 percent of the available commercial quota for the July through December 2016 fishing season for vermilion snapper will be reached by August 28, 2016. Accordingly, NMFS is reducing the commercial trip limit for vermilion snapper to 500 lb (227 kg), gutted weight, 555 lb (252 kg), round weight, in or from the South Atlantic EEZ at 12:01 a.m., local time, on August 28, 2016. This reduced commercial trip limit will remain in effect until the start of the next commercial fishing season on January 1, 2017, or until the commercial quota is reached and the commercial sector closes, whichever occurs first.

Classification

The Regional Administrator, Southeast Region, NMFS, has determined this temporary rule is necessary for the conservation and management of South Atlantic vermilion snapper and is consistent with the Magnuson-Stevens Act and other applicable laws.

This action is taken under 50 CFR 622.191(a)(6)(ii) and is exempt from review under Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act because the temporary rule is issued without opportunity for prior notice and comment.

This action responds to the best scientific information available. The Assistant Administrator for NOAA Fisheries (AA) finds that the need to immediately implement this commercial trip limit reduction constitutes good cause to waive the requirements to provide prior notice and opportunity for public comment pursuant to the authority set forth in 5 U.S.C. 553(b)(B), because prior notice and opportunity for public comment on this temporary rule is unnecessary and contrary to the public interest. Such procedures are unnecessary, because the rule establishing the trip limit has already been subject to notice and comment, and all that remains is to notify the public of the trip limit reduction. Prior notice and opportunity for public comment is contrary to the public interest, because any delay in reducing the commercial trip limit could result in the commercial quota being exceeded. There is a need to immediately implement this action to protect the vermilion snapper resource, since the capacity of the fishing fleet allows for rapid harvest of the commercial quota. Prior notice and opportunity for public comment on this action would require time and increase the probability that the commercial sector could exceed its quota.

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 22, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–20414 Filed 8–22–16; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 81, No. 165
Thursday, August 25, 2016

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2016–8840; Airspace Docket No. 16–AGL–20]

Proposed Amendment of Class E Airspace for the Following Ohio Towns; Marion, OH; Portsmouth, OH; Van Wert, OH; and Versailles, OH

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify Class E airspace extending upward from 700 feet above the surface at Marion Municipal Airport, Marion, OH; Greater Portsmouth Regional Airport, Portsmouth, OH; Van Wert County Airport, Van Wert, OH; and Darke County Airport, Versailles, OH. Decommissioning of non-directional radio beacon (NDB), cancellation of NDB approaches, and implementation of area navigation (RNAV) procedures have made this action necessary for the safety and management of Instrument Flight Rules (IFR) operations at these airports. Additionally, the geographic coordinates for Southern Ohio Regional Medical Center Heliport, Portsmouth OH; and Darke County Airport would be adjusted to coincide with the FAA's aeronautical database. Also, the name of Southern Ohio Regional Medical Center Heliport (formerly Southern Ohio Medical Center Helipad) would be updated to coincide with the FAA's aeronautical database.

DATES: Comments must be received on or before October 11, 2016.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590; telephone (202) 366–9826, or 1–800–647–5527. You must identify FAA Docket No. FAA–2016–8840; Airspace Docket No. 16–AGL–20, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

FAA Order 7400.9Z, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *http://www.faa.gov/air_traffic/publications/*. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: 202–267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.9Z at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal-regulations/ibr_locations.html.*

FAA Order 7400.9, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend Class E airspace extending upward from 700 feet above the surface at Marion Municipal Airport, Marion, OH; Greater Portsmouth Regional Airport, Portsmouth, OH; Van Wert County Airport, Van Wert, OH; and Darke County Airport, Versailles, OH.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2016–8840/Airspace Docket No. 16–AGL–20." The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.regulations.gov*.

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX, 76177.

Availability and Summary of Documents Proposed for Incorporation by Reference

This document proposes to amend FAA Order 7400.9Z, Airspace Designations and Reporting Points, dated August 6, 2015, and effective September 15, 2015. FAA Order 7400.9Z is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.9Z lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by modifying Class E airspace extending upward from 700 feet above the surface:

Within a 7-mile radius (reduced from a 7.4-mile radius) of Marion Municipal Airport, Marion, OH;

Within a 6.8-mile radius (increased from a 6.4-mile radius) of Greater Portsmouth Regional Airport, Portsmouth, OH, and updating the name and geographic coordinates of Southern Ohio Regional Medical Center Heliport (formerly Southern Ohio Medical Center Helipad), Portsmouth, OH, to coincide with the FAA's aeronautical database;

Within a 6.5-mile radius (reduced from a 7-mile radius) of Van Wert County Airport, Van Wert, OH;

And within a 6.4-mile radius (increased from a 6.3-mile radius) of Darke County Airport, Versailles, OH, removing the segment extending 7 miles west of the airport, and updating the geographic coordinates of the airport to coincide with the FAA's aeronautical database.

Airspace reconfiguration is necessary due to the decommissioning of NDBs, cancellation of NDB approaches, and implementation of RNAV procedures at the above airports. Controlled airspace is necessary for the safety and management of the standard instrument approach procedures for IFR operations at the airports.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9Z, dated August 6, 2015, and effective September 15, 2015, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures" prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9Z, Airspace Designations and Reporting Points, dated August 6, 2015, and effective September 15, 2015, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth

* * * * *

AGL OH E5 Marion, OH [Amended]

Marion Municipal Airport, OH
(Lat. 40°36′59″ N., long. 83°03′49″ W.)

That airspace extending upward from 700 feet above the surface within a 7-mile radius of Marion Municipal Airport, excluding that airspace within the Bucyrus, OH, Class E airspace area.

* * * * *

AGL OH E5 Portsmouth, OH [Amended]

Greater Portsmouth Regional Airport, OH
(Lat. 38°50′26″ N., long. 82°50′50″ W.)
Portsmouth, Southern Ohio Regional Medical Center Heliport, OH, Point in Space Coordinates
(Lat. 38°45′16″ N., long. 82°58′38″ W.)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of Greater Portsmouth Regional Airport, and within a 6-mile radius of the Point in Space serving Southern Ohio Regional Medical Center Heliport.

* * * * *

AGL OH E5 Van Wert, OH [Amended]

Van Wert County Airport, OH
(Lat. 40°51′50″ N., long. 84°36′23″ W.)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Van Wert County Airport.

AGL OH E5 Versailles, OH [Amended]

Darke County Airport, OH
(Lat. 40°12′16″ N., long. 84°31′55″ W.)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Darke County Airport.

Issued in Fort Worth, Texas, on August 15, 2016.

Christopher Southerland,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2016–20124 Filed 8–24–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2016–8835; Airspace Docket No. 16–ASW–14]

Proposed Amendment of Class E Airspace for the Paragould, AR

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify Class E airspace extending upward from 700 feet above the surface at Kirk Field, Paragould, AR. Decommissioning of the non-directional radio beacons (NDB), cancellation of NDB approaches, and implementation of area navigation (RNAV) procedures have made this action necessary for the safety and management of Instrument Flight Rules (IFR) operations at the airport.

DATES: Comments must be received on or before October 11, 2016.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590; telephone (202) 366–9826, or 1–800–647–5527. You must identify FAA Docket No. FAA–2016–8835; Airspace Docket No. 16–ASW–14, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

FAA Order 7400.9Z, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *http://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: 202–267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.9Z at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal-regulations/ibr_locations.html.*

FAA Order 7400.9, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend Class E airspace at Kirk Field, Paragould, AR.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2016–8835/Airspace Docket No. 16–ASW–14." The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.regulations.gov.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Availability and Summary of Documents Proposed for Incorporation by Reference

This document proposes to amend FAA Order 7400.9Z, Airspace Designations and Reporting Points, dated August 6, 2015, and effective September 15, 2015. FAA Order 7400.9Z is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.9Z lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by modifying Class E airspace extending upward from 700 feet above the surface within a 6.5-mile radius (increased from the 6.4-mile radius) of Kirk Field, Paragould, AR, with an extension south of the airport from the 6.5-mile radius 10.1 miles. Airspace reconfiguration is necessary due to the decommissioning of the NDB, cancellation of NDB approach, and implementation of RNAV procedures at the airport. Controlled airspace is necessary for the safety and management of the standard instrument approach procedures for IFR operations at the airport.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9Z, dated August 6, 2015, and effective September 15, 2015, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures" prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9Z, Airspace Designations and Reporting Points, dated August 6, 2015, and effective September 15, 2015, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth

* * * * *

ASW AR E5 Paragould, AR [Amended]

Kirk Field, AR
(Lat. 36°03′50″ N., long. 90°30′33″ W.)
Jonesboro VOR
(Lat. 35°52′30″ N., long. 90°35′19″ W.)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Kirk Field, and within 3 miles each side of the 019° radial from the Jonesboro VOR extending from the 6.5-mile radius to 10.1 miles south of the airport.

Issued in Fort Worth, Texas, on August 15, 2016.

Christopher Southerland,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2016–20137 Filed 8–24–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2016–6413; Airspace Docket No. 16–AWP–11]

Proposed Establishment Class E Airspace, Silver Springs, NV

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E airspace extending upward from 700 feet above the surface at Silver Springs Airport, Silver Springs, NV. The FAA found establishment of airspace necessary for the safety and management of Instrument Flight Rules (IFR) operations for new Standard Instrument Approach Procedures (SIAPs) at the airport.

DATES: Comments must be received on or before October 11, 2016.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590; telephone (202) 366–9826 or 1–800–647–5527. You must identify FAA Docket No. FAA–2016–6413; Airspace Docket No. 16–AWP–11, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

FAA Order 7400.9Z, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *http://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: 202–267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.9Z at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal-regulations/ibr_locations.html.*

FAA Order 7400.9, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

FOR FURTHER INFORMATION CONTACT: Richard Roberts, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 203–4517.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would establish Class E airspace at Silver Springs Airport, Silver Springs, NV.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2016–6413/Airspace Docket No. 16–AWP–11." The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 1601 Lind Avenue SW., Renton, WA 98057.

Availability and Summary of Documents Proposed for Incorporation by Reference

This document proposes to amend FAA Order 7400.9Z, Airspace Designations and Reporting Points, dated August 6, 2015, and effective September 15, 2015. FAA Order 7400.9Z is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.9Z lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by establishing Class E airspace extending upward from 700 feet above the surface at Silver Springs Airport, Silver Springs, NV, to accommodate new standard instrument approach procedures for IFR operations at the airport. The Class E airspace area would be established to within a 2-mile radius of Silver Springs Airport, with segments extending from the 2-mile radius to 9 miles northeast, and 7.5 miles northeast of the airport.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9Z, dated August 6, 2015, and effective September 15, 2015, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures" prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9Z, Airspace Designations and Reporting Points, dated August 6, 2015, and effective September 15, 2015, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth

* * * * *

AWP NV E5 Silver Springs, NV [New]

Silver Springs, NV
(Lat. 39°24′11″ N., long. 119°15′4″ W.)

That airspace extending upward from 700 feet above the surface within a 2-mile radius of Silver Springs Airport, and that airspace 2 miles either side of the 69° bearing from the 2-mile radius to 9 miles northeast of the airport, and that airspace 1.5 miles either side of the 60° bearing from the 2-mile radius to 7.5 miles northeast of the airport.

Issued in Seattle, Washington, on August 11, 2016.

Tracey Johnson,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2016–20117 Filed 8–24–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2016–8828; Airspace Docket No. 16–ASW–13]

Proposed Amendment of Class E Airspace for the Following Texas Towns; Levelland, TX; Vernon, TX; and Winters, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify Class E airspace extending upward from 700 feet above the surface at Levelland Municipal Airport, Levelland, TX; Wilbarger County Airport, Vernon, TX; and Winters Municipal Airport, Winters, TX. Decommissioning of non-directional radio beacon (NDB), cancellation of NDB approaches, and implementation of area navigation (RNAV) procedures have made this action necessary for the safety and management of Instrument Flight Rules (IFR) operations at these airports. Additionally, the geographic coordinates at Levelland Municipal Airport and Wilbarger County Airport would be adjusted to coincide with the FAA's aeronautical database.

DATES: Comments must be received on or before October 11, 2016.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590; telephone (202) 366–9826, or 1–800–647–5527. You must identify FAA Docket No. FAA–2016–8828; Airspace Docket No. 16–ASW–13, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

FAA Order 7400.9Z, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *http://www.faa.gov/air_traffic/publications/*. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: 202–267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.9Z at NARA, call 202–741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal-regulations/ibr_locations.html.*

FAA Order 7400.9, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

FOR FURTHER INFORMATION CONTACT: Jeffrey Claypool, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5711.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend Class E airspace extending upward from 700 feet above the surface at Levelland Municipal Airport, Levelland, TX; Wilbarger County Airport, Vernon, TX; and Winters Municipal Airport, Winters, TX.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2016–8828/Airspace Docket No. 16–ASW–13." The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.regulations.gov.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Availability and Summary of Documents Proposed for Incorporation by Reference

This document proposes to amend FAA Order 7400.9Z, Airspace Designations and Reporting Points, dated August 6, 2015, and effective September 15, 2015. FAA Order 7400.9Z is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.9Z lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by modifying Class E airspace extending upward from 700 feet above the surface:

Within a 6.6-mile radius (decreased from a 6.7-mile radius) of Levelland Municipal Airport, Levelland, TX, and updating the geographic coordinates of the airport to coincide with the FAA's aeronautical database;

Within a 6.6-mile radius (decreased from a 7-mile radius) of Wilbarger County Airport, Vernon, TX, and updating the geographic coordinates of the airport to coincide with the FAA's aeronautical database;

And within a 6.6-mile radius (increased from a 6.3-mile radius) of Winters Municipal Airport, Winters, TX, with an extension to the north of the airport from the 6.6-mile radius to 9.3 miles, and with a new extension to the south of the airport from the 6.6-mile radius to 9.6 miles.

Airspace reconfiguration is necessary due to the decommissioning of NDBs, cancellation of NDB approaches, and implementation of RNAV procedures at these airports. Controlled airspace is necessary for the safety and management of the standard instrument approach procedures for IFR operations at the airports.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9Z, dated August 6, 2015, and effective September 15, 2015, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order.

Regulatory Notices and Analyses

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures" prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9Z, Airspace Designations and Reporting Points, dated August 6, 2015, and effective September 15, 2015, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ASW TX E5 Levelland, TX [Amended]

Levelland Municipal, TX
(Lat. 33°33′09″ N., long. 102°22′21″ W.)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of Levelland Municipal Airport.

* * * * *

ASW TX E5 Vernon, TX [Amended]

Wilbarger County Airport, TX
(Lat. 34°13′32″ N., long. 99°17′02″ W.)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of Wilbarger County Airport.

* * * * *

ASW TX E5 Winters, TX [Amended]

Winters Municipal Airport, TX
(Lat. 31°56′50″ N., long. 99°59′09″ W.)

That airspace extending upward from 700 feet above the surface within a 6.6-mile radius of Winters Municipal Airport, and 1 mile each side of the 352° bearing from the airport extending from the 6.6-mile radius to 9.3 miles north of the airport, and within 2 miles each side of the 180° bearing from the airport from the 6.6-mile radius to 9.6 miles south of the airport.

Issued in Fort Worth, Texas, on August 17, 2016.

Christopher L. Southerland,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2016–20152 Filed 8–24–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

[Docket Number 160815742–6742–01]

RIN 0625–AB08

Modification of Regulations Regarding Basis for Normal Value

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

ACTION: Proposed rule and request for comments.

SUMMARY: The Department of Commerce ("the Department") proposes to modify the regulations pertaining to the use of constructed value or third country sales for purposes of determining normal value, where the exporting country does not constitute a viable market, and is seeking comments from parties. This modification, if adopted, will specify that, where the exporting country does not constitute a viable market, the Department normally will calculate normal value based upon constructed value. This modification would invert the preexisting order of preference that, where the exporting country does not constitute a viable market, the Department normally calculates normal value based on sales in a viable third country. The Department proposes this modification in light of certain advantages of constructed value over third country sales, such as availability of cost of production information and comparability to U.S. prices.

DATES: To be assured of consideration, written comments must be received no later than September 26, 2016.

ADDRESSES: All comments must be submitted through the Federal eRulemaking Portal at *http://www.regulations.gov,* Docket No. ITA–2016–0009, unless the commenter does not have access to the internet. Commenters that do not have access to the internet may submit the original and one electronic copy on CD–ROM of each set of comments by mail or hand delivery/courier. All comments should be addressed to Paul Piquado, Assistant Secretary for Enforcement & Compliance, Room 1870, Department of Commerce, 14th Street and Constitution Ave. NW., Washington, DC 20230. Comments submitted to the Department will be uploaded to the eRulemaking Portal at *www.Regulations.gov.*

The Department will consider all comments received before the close of the comment period. All comments responding to this notice will be a matter of public record and will be available on the Federal eRulemaking Portal at www.*Regulations.gov.* The Department will not accept comments accompanied by a request that part or all of the material be treated confidentially because of its business proprietary nature or for any other reason.

Any questions concerning file formatting, document conversion, access on the Internet, or other electronic filing issues should be addressed to Moustapha Sylla, Enforcement and Compliance, at (202) 482–4685 or email address: *webmaster-support@ita.doc.gov.*

FOR FURTHER INFORMATION CONTACT: Zachary Simmons at (202) 482–4044 or Abdelali Elouaradia at (202) 482–1374.

SUPPLEMENTARY INFORMATION:

Background

In general terms, section 731 of the Tariff Act of 1930, as amended (the Act), provides that when a company is selling foreign merchandise in the United States at less than fair value, and the International Trade Commission determines that an industry is materially injured or threatened with material injury by reason of such sales or imports, the Department shall impose an antidumping duty. Furthermore, section 751 of the Act provides that the Department shall periodically review and determine, upon request, the amount of any antidumping duty. Pursuant to section 773(a) of the Act, the Department's analysis involves a comparison between a company's sales price to, or in, the United States (defined either as export price or constructed export price) with the normal value. *See* 19 CFR 351.401(a); *see also* section 772 of the Act (defining export price and constructed export price); section 773 of the Act (defining normal value). Although in most circumstances, sales in the exporting country provide the most appropriate basis for normal value, section 773 of the Act also permits the use of third country sales or constructed value as the basis for normal value. *See also* 19 CFR 351.404(a).

The Department's regulations identify circumstances in which it may rely upon another basis for normal value. The Department may use a basis other than sales in the exporting country where, pursuant to 19 CFR 351.404(b), the Department determines that the exporting country does not constitute a viable market. 19 CFR 351.404(c). In addition, the Department may use a basis other than sales in the exporting country where a proper comparison between sales in the exporting country and sales in the United States is not possible. 19 CFR 351.404(c)(2)(i).[1]

In those circumstances where the Department determines that sales in the exporting country do not permit an appropriate comparison to United States sales, "[t]he Secretary normally will calculate normal value based on sales to a third country rather than on constructed value if adequate information is available and verifiable . . ." 19 CFR 351.404(f). Thus, although § 404(f) of the Department's regulations contemplates both sales in a third country and constructed value as bases to calculate normal value, it establishes an order of preference in which the Department "normally" will use sales in a third country. Section 404(f) establishes sales in a third country as the preferred basis to calculate normal value where (1) there are no sales of the foreign like product in the exporting country, (2) there are insufficient sales of the foreign like product in the exporting country and thus the market is not viable, or (3) the Department has otherwise determined it cannot use such sales for purposes of determining normal value pursuant to section 773(a)(1)(B)(i) of the Act.

However, the Department has identified some factors in favor of inverting the current order of preference to use, normally, constructed value rather than sales in a third country. First, the proposed preference for constructed value accords with the

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[1] The Department has exercised this discretion in the past. *See, e.g., Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan,* 65 FR 62700, 62702 (Dep't of Commerce Oct. 19, 2000) (prelim. results) (basing normal value on constructed value because "the unique, custom-built nature of each LNPP sold does not permit proper price-to-price comparisons") unchanged in *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan,* 66 FR 11555 (Dep't of Commerce Feb. 26, 2001) (final results).

TPEA, which amended section 773(b)(2) of the Act, regarding the importance of the cost of production in the Department's analysis of unfair trading behavior. Specifically, the TPEA amended section 773(b)(2) of the Act to require that the Department request cost information from individually examined respondent companies in antidumping proceedings. *See* Trade Preferences Extension Act of 2015, Public Law 114–27, 129 Stat. 362 (2015). As a consequence, the Department, in all segments of its antidumping duty proceedings for which the complete initial questionnaire was not issued as of August 6, 2015, now requires that parties provide cost of production information, which is necessary information for the use of constructed value. *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015,* 80 FR 46793, 46794 (August 6, 2015). Therefore, obtaining constructed value information will not generally impose an additional burden upon the Department or respondent parties. By comparison, the Department would not necessarily already have requested the information necessary to calculate normal value based upon sales in a third country.

Second, constructed value normally may be preferable to sales in a third country because it provides a more appropriate comparison to U.S. prices. Based upon the Department's experience, third country sales sometimes involve products that are similar, but not identical, to the products sold in the United States. *See* 19 CFR 351.404(e). However, as delineated under sections 773(e) and (f) of the Act, constructed value reflects the costs associated with the production and sale of the merchandise.

Given the foregoing considerations, the Department is issuing this proposed rule to modify the regulations at issue pursuant to Administrative Procedure Act (5 U.S.C. 553) notice and comment procedures; the Department invites comments from all parties.

Proposed Modification

The Department proposes to modify 19 CFR 351.404(f) and 19 CFR 351.405(a) as indicated below. These modifications, if adopted, are intended to establish an order of preference in which, where the exporting country does not constitute a viable market, the Department normally will calculate normal value using constructed value. Although sales in a third country remain an appropriate basis for normal value in certain circumstances, constructed value would represent the approach "normally" used by the Department.

Proposed Effective Date

The Department proposes to make this rulemaking effective for segments of antidumping duty proceedings initiated on or after 30 days following the date of publication of the final rule.

Comments

The Department invites parties to comment on this proposed rule and the proposed effective date. Further, any party may submit comments expressing its disagreement with the Department's proposal and may propose an alternative approach.

Classifications

Executive Order 12866

It has been determined that this proposed rule is not significant for purposes of Executive Order 12866.

Paperwork Reduction Act

This proposed rule contains no new collection of information subject to the Paperwork Reduction Act, 44 U.S.C. chapter 35.

Executive Order 13132

This proposed rule does not contain policies with federalism implications as that term is defined in section 1(a) of Executive Order 13132, dated August 4, 1999 (64 FR 43255 (August 10, 1999)).

Regulatory Flexibility Act

The Chief Counsel for Regulation has certified to the Chief Counsel for Advocacy of the Small Business Administration under the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that the proposed rule would not have a significant economic impact on a substantial number of small business entities.

The entities upon which this rulemaking could have an impact include foreign exporters and producers, some of whom are affiliated with U.S. companies, and U.S. importers. Enforcement & Compliance currently does not have information on the number of entities that would be considered small under the Small Business Administration's size standards for small businesses in the relevant industries. However, some of these entities may be considered small entities under the appropriate industry size standards. Although this proposed rule may indirectly impact small entities that are parties to individual antidumping duty proceedings, it will not have a significant economic impact on any entities.

The proposed action alters the Department's approach in instances where the exporting country does not constitute a viable market or, pursuant to 19 CFR 351.404(c)(2), the Department declines to calculate normal value on the basis of exporting country sales. In particular, it would direct the Department normally to rely upon constructed value, rather than sales in a third country, as the basis for normal value. However, if the proposed rule is implemented, no entities would be required to undertake additional compliance measures or expenditures. Specifically, section 773(b)(2) of the Act now requires that the Department request cost of production information from each examined respondent in every segment of an antidumping duty proceeding. As a result, for those individually examined respondents whose exporting country is not viable or where the Department cannot otherwise use the sales in the exporting country, the Department will already have required submission of the information necessary to calculate normal value based upon constructed value, thus obviating the need to request information on sales in a viable third country. Therefore, the proposed rule would not have a significant economic impact upon a substantial number of small business entities. For this reason, an Initial Regulatory Flexibility Analysis is not required and one has not been prepared.

List of Subjects in 19 CFR Part 351

Administrative practice and procedure, Antidumping, Business and industry, Cheese, Confidential business information, Countervailing duties, Freedom of information, Investigations, Reporting and recordkeeping requirements.

Dated: August 19, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

For the reasons stated, 19 CFR part 351 is proposed to be amended as follows:

PART 351—ANTIDUMPING AND COUNTERVAILING DUTIES

■ 1. The authority citation for 19 CFR part 351 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1202 note; 19 U.S.C. 1303 note; 19 U.S.C. 1671 *et seq.;* and 19 U.S.C. 3538.

■ 2. In § 351.404, revise paragraph (f) to read as follows:

§ 351.404 Selection of the market to be used as the basis for normal value.

* * * * *

(f) *Constructed value and third country sales.* The Secretary normally will calculate normal value based on constructed value (*see* section 773(a)(4) of the Act (Use of Constructed Value)) rather than on third country sales.

■ 3. In § 351.405, revise paragraph (a) to read as follows:

§ 351.405 Calculation of normal value based on constructed value.

(a) *Introduction.* In certain circumstances, the Secretary may determine normal value by constructing a value based on the cost of manufacture, selling general and administrative expenses, and profit. The Secretary may use constructed value as the basis for normal value where: The exporting country is not viable; sales below the cost of production are disregarded; sales outside the ordinary course of trade, or sales the prices of which are otherwise unrepresentative, are disregarded; sales used to establish a fictitious market are disregarded; no contemporaneous sales of comparable merchandise are available; or in other circumstances where the Secretary determines that exporting country sales are inappropriate. (*See* section 773(e) and section 773(f) of the Act.) This section clarifies the meaning of certain terms relating to constructed value.

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[FR Doc. 2016–20417 Filed 8–24–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 117 and 507

[Docket No. FDA–2016–D–2373]

Classification of Activities as Harvesting, Packing, Holding, or Manufacturing/Processing for Farms and Facilities; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification of availability.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing the availability of a draft guidance for industry entitled "Classification of Activities as Harvesting, Packing, Holding, or Manufacturing/Processing for Farms and Facilities; Draft Guidance for Industry." The draft guidance, when finalized, will help food establishments determine whether the activities that they perform are within the "farm" definition established in our regulation for Registration of Food Facilities. Determining whether the activities a food establishment performs are within the "farm" definition plays a key role in determining whether its business is exempt from our regulations for Registration of Food Facilities, and from certain requirements in our regulations for "Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Human Food" and "Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Food for Animals."

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that we consider your comment on the draft guidance before we begin work on the final version of the guidance, submit either electronic or written comments on the draft guidance by February 21, 2017.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA–2016–D–2373 for "Classification of Activities as Harvesting, Packing, Holding, or Manufacturing/Processing for Farms and Facilities; Draft Guidance for Industry." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- *Confidential Submissions*—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the draft guidance to the Office of Food Safety, Center for Food Safety and Applied Nutrition (HFS–300), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740. Send two self-addressed adhesive labels to assist that office in processing your request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance.

FOR FURTHER INFORMATION CONTACT: Jenny Scott, Center for Food Safety and Applied Nutrition (HFS–300), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–2166.

SUPPLEMENTARY INFORMATION:

I. Background

We are announcing the availability of a draft guidance for industry entitled "Classification of Activities as Harvesting, Packing, Holding, or Manufacturing/Processing for Farms and Facilities." We are issuing the draft guidance consistent with our good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of the FDA on this topic. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternate approach if it satisfies the requirements of the applicable statutes and regulations.

Section 103(c) of the FDA Food Safety Modernization Act (FSMA) directed us to conduct rulemaking to clarify the on-farm activities that would, in part, determine when an establishment is required to register with us as a "facility," or is not required to register with us because the establishment is a "farm." To do so, we conducted rulemaking to revise and add farm-related definitions to our existing regulation for Registration of Food Facilities in the same rulemaking documents that we issued to establish our regulation entitled "Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Human Food" in part 117 (21 CFR part 117). (See the final rule at 80 FR 55908, September 17, 2015). For the purposes of the draft guidance, we call that rulemaking "the farm definition rulemaking." The farm definition rulemaking revised the "farm" definition to provide for two types of farms: (1) Primary production farms and (2) secondary activities farms. The farm definition rulemaking also revised three definitions associated with the "farm" definition (*i.e.,* the definitions of "packing," "holding," and "manufacturing/processing") and added more examples of activities in each of these definitions. The farm definition rulemaking also established a new definition associated with the "farm" definition (*i.e.,* the definition of "harvesting") and included examples of harvesting activities in the definition. During the farm definition rulemaking, several comments asked us to classify specific on-farm activities as harvesting, packing, holding, or manufacturing/processing so that an operation that conducts these activities on a farm can determine whether conducting that specific activity is within, or outside, the "farm" definition. Some comments asked us to make a table of activities prominently available on our Internet site for easy access whenever the public seeks out information regarding regulations to which these activities apply. (See 80 FR 55908 at 55920.) To address these comments, we announced our intent to issue a draft guidance with our current thinking on the classification of activities as "harvesting," "packing," "holding," or "manufacturing/processing" (80 FR 55908 at 55921). The draft guidance that we are making available implements that stated intent.

The draft guidance provides examples of activities classified as "harvesting," "packing," "holding," or "manufacturing/processing," as well as activities classified in more than one way. We note that the list of examples of activities classified as "holding" in the draft guidance does not include "repacking and blast freezing . . . when product is not exposed to the environment," despite our statement in the farm definition rulemaking that such activities would be considered practical necessities for distribution and therefore "holding." See 80 FR 55908 at 55934 (Comment/Response 44). We made similar statements in a related rulemaking to establish our regulation entitled "Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Food for Animals" in part 507 (21 CFR part 507) (80 FR 56170, September 17, 2015). See 80 FR 56170 at 56192 (Comment/Response 39). Our prior statements were incorrect and we hereby withdraw them. Neither "repacking" nor "blast freezing" should be considered a "holding" activity. We have thought more about what should be considered a "practical necessity" and are explaining our thinking more in the draft guidance.

II. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 1, subpart H have been approved under OMB control number 0910–0502. The collections of information in part 117 have been approved under OMB control number 0910–0751. The collections of information in 21 CFR part 507 have been approved under OMB control number 0910–0789. The collections of information in 21 CFR part 112 have been approved under OMB control number 0910–0816. The collections of information in 21 CFR part 121 have been approved under OMB control number 0910–0812.

III. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/ForIndustry/ColorAdditives/GuidanceComplianceRegulatoryInformation/ucm153033.htm* or *http://www.regulations.gov.* Use the FDA Web site listed in the previous sentence to find the most current version of the guidance.

Dated: August 19, 2016.

Jeremy Sharp,

Deputy Commissioner for Policy, Planning, Legislation, and Analysis.

[FR Doc. 2016–20301 Filed 8–24–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 56 and 57

[Docket No. MSHA–2014–0030]

RIN 1219–AB87

Examinations of Working Places in Metal and Nonmetal Mines

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Proposed rule; extension of comment period; close of record.

SUMMARY: In response to stakeholder requests, the Mine Safety and Health Administration (MSHA) is extending the comment period for Agency's proposed rule on Examinations of Working Places in Metal and Nonmetal Mines. The document also clarifies and seeks additional comments on selected proposed provisions.

DATES: The comment period for the proposed rule published on June 8, 2016 (81 FR 36818), is extended. Comments must be received or postmarked by midnight Eastern Daylight Savings Time on September 30, 2016.

ADDRESSES: Submit comments and informational materials, identified by RIN 1219–AB87 or Docket No. MSHA–2014–0030, by one of the following methods listed below:

- *Federal E-Rulemaking Portal: http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Email: zzMSHA-comments@dol.gov*.
- *Mail:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.
- *Hand Delivery or Courier:* 201 12th Street South, Suite 4E401, Arlington, Virginia, between 9:00 a.m. and 5:00 p.m. Monday through Friday, except Federal holidays. Sign in at the receptionist's desk on the 4th floor East, Suite 4E401.
- *Fax:* 202–693–9441.

Instructions: All submissions for the proposed rule must include RIN 1219–AB87 or Docket No. MSHA–2014–0030. MSHA posts all comments without change, including any personal information provided. Access comments electronically on *http://www.regulations.gov* and on MSHA's Web site at *https://www.msha.gov/regulations/rulemaking*.

Docket: The proposed rule for Examinations of Working Places in Metal and Nonmetal Mines was published on June 8, 2016 (81 FR 36818). The document is available on *https://www.regulations.gov* and on MSHA's Web site at *https://www.msha.gov/regulations/rulemaking/examinations-working-places-metal-and-nonmetal-mines*. Review comments in person at the Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452. Sign in at the receptionist's desk on the 4th floor East, Suite 4E401.

Email Notification: To subscribe to receive email notification when MSHA publishes rulemaking documents in the **Federal Register**, go to *https://www.msha.gov*.

FOR FURTHER INFORMATION CONTACT: Sheila A. McConnell, Director, Office of Standards, Regulations, and Variances, MSHA, at *mcconnell.sheila.a@dol.gov* (email), 202–693–9440 (voice); or 202–693–9441 (facsimile). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

Background

On June 8, 2016 (81 FR 36818), the Mine Safety and Health Administration (MSHA) published a proposed rule on Examinations of Working Places in Metal and Nonmetal (MNM) mines. The purpose of this proposed rule is to ensure that mine operators identify and correct conditions that may adversely affect miners' safety or health. MSHA conducted public hearings on the proposed rule on July 19, 21, 26, and August 4, 2016. In response to stakeholder requests, MSHA is providing additional time for interested parties to comment on the proposed rule. MSHA is extending the deadline for comments from September 6, 2016, to September 30, 2016.

I. Request for Comments and Close of Record

Under proposed §§ 56.18002(a)(1) and 57.18002(a)(1), MSHA proposed that metal and nonmetal mine operators promptly notify miners in any affected areas of any conditions found that may adversely affect safety or health and promptly initiate appropriate action to correct such conditions. MSHA received comments and testimony requesting that the Agency clarify the proposed requirement "to promptly notify miners." Upon consideration of such comments and testimony, MSHA clarifies that "to promptly notify miners" means any notification to the miners that alerts them to adverse conditions in their working place so that they can take necessary precautions to avoid an accident or injury before they begin work in that area. This notification could take any form that is effective to notify affected miners of the particular condition: Verbal notification, prominent warning signage, other written notification, etc. MSHA believes that, in most cases, verbal notification or descriptive warning signage would be needed to ensure that all affected miners received actual notification of the specific condition in question.

MSHA also clarifies that a "prompt" notification would occur before miners are potentially exposed to the condition; *e.g.*, before miners begin work in the affected areas, or as soon as possible after work begins if the condition is discovered while they are working in an area. For example, this notification could occur when miners are given work-shift assignments. MSHA seeks comments on proposed §§ 56.18002(a)(1) and 57.18002(a)(1).

MSHA also clarifies that the proposed rule would not change existing standards regarding conditions that present imminent danger. Like the existing rule, the proposed §§ 56.18002(a)(2) and 57.18002(a)(2) continue to require that conditions that may present an imminent danger which are noted by the person conducting the examination shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.

As MSHA stated during the public hearings, the proposed rule would not change the existing definition of working place. Existing §§ 56.2 and 57.2 define "working place" as: "Any place in or about a mine where work is being performed." Regarding the timing of the examination, some commenters expressed concern that the proposed rule would require mine operators to conduct an examination of the entire mine before the start of each shift. It is not MSHA's intent for the mine operator to examine the entire mine before work begins. The proposal would require an examination of "each working place" "before work begins in an area." A "working place" is not the entire mine unless miners will be working in all areas of the mine. "Before work begins in an area" may or may not coincide with the start of any particular shift; it depends on when miners actually will be working in any particular working place. The proposed rule, like the existing rule, would require examinations in only those areas where work will be performed. As MSHA stated in the preamble, a "working place" applies to all locations at a mine where miners work in the extraction or milling processes. (81 FR 36821.) MSHA clarifies that consistent with the existing definition of "working place," this includes roads traveled to and from a work area.

MSHA further explained that a working place would not include roads not directly involved in the mining process, administrative office buildings, parking lots, lunchrooms, toilet facilities or inactive storage areas. Unless required by other standards, mine operators would only be required to examine isolated, abandoned, or idle areas of mines or mills when miners have to perform work in these areas during the shift.

In MSHA's June 8, 2016 **Federal Register** proposed rule (81 FR 36826), the introductory text of §§ 56.18002(b) and 57.18002(b) stated that the person conducting the examination would be required to sign and date the record before the end of the shift for which the examination was made. MSHA has received a number of comments and heard testimony at the public hearings on stakeholder concerns that the proposed requirement to sign the examination record would increase the potential for liability of miners under section 110(c) of the Mine Act for those who conduct workplace examinations. MSHA notes that Mine Act liability as an "agent" of an operator under section 110(c) relates to the substantive duties and delegated responsibilities of the person in question. The proposed rule language would not change the qualification requirements for the "competent person" (although MSHA asked for comments on this issue). The proposal also would not change the substantive requirements either for the areas to be examined or the adverse conditions for which the examination would be made. While the degree of responsibility a particular person may have at any given mine may vary widely, the single act of printing one's initials or name, as opposed to signing one's name, adds no more and no less to the substantive duties and qualifications of the person who conducts the examination.

Nonetheless, some commenters were concerned that the signature requirement would discourage miners from conducting working place examinations and would have a negative impact on the quality of the examination. MSHA seeks comments on an alternative approach of simply requiring that the name of the competent person, rather than the signature, be included in the examination record.

MSHA received a number of comments and heard testimony at the public hearings seeking clarification on the recordkeeping requirements for adverse conditions found that are immediately corrected. Some commenters were concerned that recording every condition and every corrective action would be an excessive burden to mine operators, especially for small operators. As MSHA stated, the Agency believes that making and maintaining a record of adverse conditions found and corrective actions taken would help mine operators and miners and their representatives become more aware of potential dangers and more proactive in their approach to correcting these issues before they cause or contribute to an accident, injury, or fatality. (81 FR 36819). MSHA seeks information on how mine operators have used the examination record to identify and correct systemic adverse conditions that may contribute to an accident, injury, or fatality. In addition, MSHA seeks comment on possible limitations that would be placed on the mine operators' ability to use the examination record to identify and correct systemic adverse conditions if a record of an adverse condition that is immediately corrected is not made.

MSHA received a number of comments and heard testimony at the public hearings asking if MSHA would require the person conducting the working place examination to wait until the end of the shift to make the record. MSHA clarifies that the proposed rule would allow the competent person conducting the exam to make the record any time before the end of the shift.

II. Paperwork Reduction Act of 1995

MSHA's proposed rule contains changes that would affect the burden in an existing OMB Control Number 1219–0089. MSHA, the Department of Labor, and the Office of Management and Budget are particularly interested in comments related to the recordkeeping requirement that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

MSHA solicits comments from the mining community on all aspects of the proposed rule. Commenters are requested to be specific in their comments and to provide sufficient detail in their responses to enable proper Agency review and consideration. All comments must be received by September 30, 2016.

Dated: August 17, 2016.

Joseph A. Main,

Assistant Secretary of Labor for Mine Safety and Health.

[FR Doc. 2016–20395 Filed 8–23–16; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 57, 70, 72, and 75

[Docket No. MSHA–2014–0031]

RIN 1219–AB86

Exposure of Underground Miners to Diesel Exhaust

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Request for information; extension of comment period.

SUMMARY: In response to requests from the public, the Mine Safety and Health Administration (MSHA) is extending the comment period on the Agency's request for information on Exposure of Underground Miners to Diesel Exhaust. This extension gives stakeholders additional time to evaluate the comments and testimony received thus far and submit information to the Agency.

DATES: The comment period for the request for information published on June 8, 2016 (81 FR 36826), is extended. Comments must be received by midnight Eastern Standard Time on November 30, 2016.

ADDRESSES: Submit comments and informational materials for the rulemaking record, identified by RIN 1219–AB86 or Docket No. MSHA–2014–0031, by one of the following methods:

- *Federal E-Rulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Email: zzMSHA-comments@dol.gov.*
- *Mail:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.
- *Hand Delivery or Courier:* 201 12th Street South, Suite 4E401, Arlington, Virginia, between 9:00 a.m. and 5:00 p.m. Monday through Friday, except Federal holidays. Sign in at the receptionist's desk on the 4th Floor East, Suite 4E401.
- *Fax:* 202–693–9441.

Instructions: All submissions must include "RIN 1219–AB86" or "Docket No. MSHA–2014–0031." Do not include personal information that you do not want publicly disclosed; MSHA will post all comments without change to *http://www.regulations.gov* and *http://arlweb.msha.gov/currentcomments.asp,* including any personal information provided.

Docket: For access to the docket to read comments received, go to *http://*

www.regulations.gov or *http://arlweb.msha.gov/currentcomments.asp.* To read background documents, go to *http://www.regulations.gov.* Review the docket in person at MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Arlington, Virginia, between 9:00 a.m. and 5:00 p.m. Monday through Friday, except Federal Holidays. Sign in at the receptionist's desk in Suite 4E401.

Email Notification: To subscribe to receive an email notification when MSHA publishes rules in the **Federal Register**, go to *http://www.msha.gov.*

FOR FURTHER INFORMATION CONTACT: Sheila A. McConnell, Director, Office of Standards, Regulations, and Variances, MSHA, at *mcconnell.sheila.a@dol.gov* (email), 202–693–9440 (voice); or 202–693–9441 (facsimile). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: On June 8, 2016 (81 FR 36826), MSHA published a request for information on Exposure of Underground Miners to Diesel Exhaust. The request for information seeks input from the public that will help MSHA evaluate the Agency's existing standards and policy guidance on controlling miners' exposures to diesel exhaust to evaluate the effectiveness of the protection now in place to preserve miners' health.

On June 27, 2016, (81 FR 41486), MSHA published a notice in the **Federal Register** announcing the dates and locations for four public meetings on the request for information. MSHA held meetings on July 19, 21, and 26 and August 4, 2016. In response to requests from the public, MSHA is providing additional time for interested parties to comment. MSHA is extending the comment period from September 6, 2016, to November 30, 2016.

Dated: August 17, 2016.

Joseph A. Main,

Assistant Secretary of Labor for Mine Safety and Health.

[FR Doc. 2016–20396 Filed 8–24–16; 8:45 am]

BILLING CODE 4520–43–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

31 CFR Parts 1010 and 1020

RIN 1506–AB28

Customer Identification Programs, Anti-Money Laundering Programs, and Beneficial Ownership Requirements for Banks Lacking a Federal Functional Regulator

AGENCY: Financial Crimes Enforcement Network ("FinCEN"), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: FinCEN is issuing this proposed rule to implement section 326 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 and to remove the anti-money laundering program exemption for banks that lack a Federal functional regulator, including, but not limited to, private banks, non-federally insured credit unions, and certain trust companies. The proposed rule would prescribe minimum standards for anti-money laundering programs for banks without a Federal functional regulator to ensure that all banks, regardless of whether they are subject to Federal regulation and oversight, are required to establish and implement anti-money laundering programs, and would extend customer identification program requirements and beneficial ownership requirements to those banks not already subject to these requirements.

DATES: Written comments may be submitted to FinCEN on or before October 24, 2016.

ADDRESSES: You may submit comments, identified by Regulatory Identification Number (RIN) 1506–AB28, by any of the following methods:

- *Federal E-rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Include 1506–AB28 in the submission. Refer to Docket Number FINCEN–2014–0004.
- *Mail:* Policy Division, Financial Crimes Enforcement Network, P.O. Box 39, Vienna, VA 22183. Include 1506–AB28 in the body of the text. Please submit comments by one method only. Comments submitted in response to this notice of proposed rulemaking ("NPRM") will become a matter of public record. Therefore, you should submit only information that you wish to make publicly available.

Inspection of comments: FinCEN uses the electronic, Internet-accessible dockets at *Regulations.gov* as their complete, official-record docket; all hard copies of materials that should be in the docket, including public comments, are electronically scanned and placed there. **Federal Register** notices published by FinCEN are searchable by docket number, RIN, or document title, among other things, and the docket number, RIN, and title may be found at the beginning of the notice. In general, FinCEN will make all comments publicly available by posting them on *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: The FinCEN Resource Center at (800) 767–2825 or email *frc@fincen.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Provisions

FinCEN exercises regulatory functions primarily under the Currency and Financial Transactions Reporting Act of 1970, as amended by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act") (Pub. L. 107–56) and other legislation. This legislative framework is commonly referred to as the "Bank Secrecy Act" ("BSA").[1] The Secretary of the Treasury ("Secretary") has delegated to the Director of FinCEN the authority to implement, administer, and enforce compliance with the BSA and associated regulations.[2] Pursuant to this authority, FinCEN may issue regulations requiring financial institutions to keep records and file reports that "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism."[3] Additionally, FinCEN is authorized to impose anti-money laundering ("AML") program requirements for financial institutions.[4]

Section 352 of the USA PATRIOT Act requires financial institutions to establish AML programs that, at a minimum, include: (1) The development of internal policies, procedures, and controls; (2) the designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test programs.[5] Section 352 of the USA PATRIOT Act authorizes FinCEN, in consultation with the "appropriate" Federal functional regulator (using the definition of "Federal functional regulator" found in 15 U.S.C. 6809), to prescribe minimum standards for AML programs. In determining the appropriate scope and nature for this proposed rulemaking for financial institutions that are not directly regulated by any Federal functional regulator under any definition of that term, FinCEN considered the Federal functional regulators of similar institutions, including Federal bank supervisory authorities, the U.S. Securities and Exchange Commission ("SEC"), and the Commodity Futures Trading Commission ("CFTC"), to be "appropriate" Federal functional regulators within the meaning of Section 352. In preparing this rule, FinCEN consulted with these regulators and in order to be certain of addressing all important issues, it also consulted with state bank supervisory authorities, and the Internal Revenue Service ("IRS"), which, to date, has been the examining authority for all institutions regulated by FinCEN that do not have a Federal functional regulator.

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[1] The BSA is codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, 31 U.S.C. 5311–5314 and 5316–5332, and notes thereto, with implementing regulations at 31 CFR chapter X. *See* 31 CFR 1010.100(e).

[2] Treasury Order 180–01 (Jul. 1, 2014).

[3] 31 U.S.C. 5311.

[4] 31 U.S.C. 5318(h).

When prescribing minimum standards for AML programs, FinCEN must "consider the extent to which the requirements imposed [under section 352 of the USA PATRIOT Act] are commensurate with the size, location, and activities of the financial institutions to which [the standards] apply."[6] In addition, FinCEN may "prescribe an appropriate exemption from a requirement [in the BSA] or regulations [issued under the BSA]."[7] FinCEN used this authority in 2002 to exempt temporarily certain financial institutions identified in section 352 from the requirement to establish an AML program.

Section 326 of the USA PATRIOT Act requires FinCEN to prescribe regulations that require financial institutions to establish programs for account opening that, at a minimum, include: (1) Verifying the identity of any person seeking to open an account, to the extent reasonable and practicable; (2) maintaining records of the information used to verify the person's identity, including name, address, and other identifying information; and (3) determining whether the person appears on any lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency.[8] These programs are referred to as Customer Identification Programs ("CIPs").

When prescribing CIP regulations for financial institutions that engage in financial activities described in Section 4(k) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(k), FinCEN must prescribe such CIP regulations jointly with the Federal functional regulator (again using the definition of "Federal functional regulator" found in 15 U.S.C. 6809, but also including the CFTC) that is "appropriate" for the affected financial institutions.[9] FinCEN generally considers the Federal functional regulator—if any—that actually regulates a financial institution to be the Federal functional regulator appropriate to promulgate regulations for such a financial institution.[10] Specifically with respect to CIP rules, FinCEN has maintained publicly since 2003 that, for a CIP rule that applies to institutions not directly regulated by any Federal functional regulator under any definition of that term, it is not "appropriate" for any Federal agency to issue jointly such a CIP rule with FinCEN, given that no Federal agency has direct supervisory authority over such financial institutions comparable in its pervasiveness to the direct authority of the Federal functional regulators over their regulated financial institutions.[11] Consistent with these long-held positions, FinCEN proposes to issue the CIP rule set forth here under its sole authority.

Section 312 of the USA PATRIOT Act requires each U.S. financial institution that establishes, maintains, administers, or manages a correspondent account or a private banking account in the United States for a non-U.S. person to subject such accounts to certain anti-money laundering measures.[12] In particular, financial institutions must establish appropriate, specific, and, where necessary, enhanced due diligence policies, procedures, and controls that are reasonably designed to enable the financial institution to detect and report instances of money laundering through these accounts. In addition to the general due diligence requirements, which apply to all correspondent accounts for non-U.S. persons, section 5318(i)(2) specifies additional standards for correspondent accounts maintained for certain foreign banks. Section 5318(i) also sets forth minimum due diligence requirements for private banking accounts for non-U.S. persons. Specifically, a covered financial institution must take reasonable steps to ascertain the identity of the nominal and beneficial owners of, and the source of funds deposited into, private banking accounts, as necessary to guard against money laundering and to report suspicious transactions. The institution must also conduct enhanced scrutiny of private banking accounts requested or maintained for, or on behalf of, senior foreign political figures (which includes family members or close associates). Enhanced scrutiny must be reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption.

B. Regulatory Background

The following information describes the effect of certain previous rulemakings on banks, and specifically on banks lacking a Federal functional regulator.

AML Program Requirements

Most banks became subject to an AML program requirement pursuant to the BSA with FinCEN's issuance of an Interim Final Rule on April 29, 2002 (the "Interim Final Rule").[13] The Interim Final Rule stated that an institution regulated by a Federal functional regulator "shall be deemed to satisfy the requirements of 31 U.S.C.

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[5] *Id.*

[6] Public Law 107–56, title III, Sec. 352(c), 115 Stat. 322.

[7] 31 U.S.C. 5318(a)(6).

[8] 31 U.S.C. 5318(*l*). *See* Joint Final Rule—Customer Identification Programs for Banks, Savings Associations, Credit Unions and Certain Non-Federally Regulated Banks, 68 FR 25103 (May 9, 2003) ("The CIP must include procedures for determining whether the customer appears on any list of known or suspected terrorists or terrorist organizations issued by any Federal government agency and designated as such by Treasury in consultation with the Federal functional regulators." To date, the Department of the Treasury has not designated any such list.).

[9] 31 U.S.C. 5318(*l*)(4). The financial institutions subject to the CIP rule being proposed here engage in financial activities within the meaning of 12 U.S.C. 1843(k), in particular lending money and providing financial advisory services. *See* 12 U.S.C. 1843(k)(4)(A) and (C).

[10] *See, e.g.,* 31 CFR 1020.210(a).

[11] *See* Notice of Proposed Rulemaking—Customer Identification Programs for Certain Banks Lacking a Federal Functional Regulator, 68 FR 25163 (May 9, 2003).

[12] These requirements are set forth and cross referenced in sections 1020.610 (cross-referencing to 31 CFR 1010.610) and 1020.620 (cross-referencing to 31 CFR 1010.620).

[13] *See* Interim Final Rule—Anti-Money Laundering Programs for Financial Institutions, 67 FR 21110 (Apr. 29, 2002). Since 1987, all federally insured depository institutions and credit unions have been required by their Federal regulators to have anti-money laundering programs "to assure and monitor compliance with the requirements of subchapter II of chapter 53 of title 31, United States Code," but until the passage of the USA PATRIOT Act the requirement to implement such programs did not arise under a specific provision of the Bank Secrecy Act itself. *See* Final Rule—Procedures for Monitoring Bank Secrecy Act Compliance, 52 FR 2858 (Jan. 27, 1987).

5318(h)(1) if it implements and maintains an [AML] program that complies with the regulation of its Federal functional regulator governing such programs." [14] "Federal functional regulator" is defined at 31 CFR 1010.100(r) to include each of the Federal banking agencies, as well as the SEC and the CFTC.

The Interim Final Rule also deferred AML program requirements for certain financial institutions, including "private bankers." [15] On November 6, 2002, FinCEN amended the Interim Final Rule.[16] The amendment extended the deferral indefinitely,[17] and included within the deferral not only private bankers, but any bank "that is not subject to regulation by a Federal functional regulator." [18]

Although banks that lack a Federal functional regulator have not been required to establish an AML program, they are required to comply with many other BSA requirements. For example, banks that lack a Federal functional regulator still must file currency transaction reports ("CTRs") and suspicious activity reports ("SARs"), and make and maintain certain records.[19] In addition, banks that lack a Federal functional regulator must comply with 31 CFR 1010.630, which prohibits covered financial institutions from maintaining correspondent accounts for foreign shell banks and requires covered financial institutions to obtain and retain information on the ownership of foreign banks.[20]

Despite being subject to the various BSA obligations detailed above, banks that lack a Federal functional regulator have remained exempt from the AML program requirement since the Interim Final Rule. In contrast, FinCEN has already eliminated the exemption and promulgated AML program rules for other institutions that had been exempted under the Interim Final Rule, including insurance companies, certain loan or finance companies, and dealers in precious metals, precious stones, or jewels.

Customer Identification Program Requirements

CIP requirements were finalized, through a joint final rule, for banks, savings associations, credit unions, and certain non-Federally regulated banks on May 9, 2003. With this action, certain banks that lack a Federal functional regulator, namely, private banks, non-federally insured credit unions and certain trust companies, were required to comply with CIP requirements.[21] On the same day, FinCEN published a notice of proposed rulemaking that would have imposed CIP requirements on all other state-regulated banks without a Federal functional regulator that were not included in the joint rule.[22] This rulemaking was never finalized.

Beneficial Ownership Requirement

On May 11, 2016, FinCEN published a final rule ("CDD Rule"),[23] to clarify and strengthen customer due diligence requirements for certain financial institutions, including federally regulated banks, requiring these financial institutions to identify and verify the identity of the beneficial owners of their legal entity customers, subject to certain exclusions and exemptions. The CDD Rule also amends the AML program requirements for these financial institutions. For purposes of regulatory consistency, FinCEN believes that it is appropriate that these requirements should apply to non-federally regulated banks as well, and accordingly proposes these requirements in this notice.

C. Categories of Banks Lacking a Federal Functional Regulator

FinCEN has identified the following categories of banks that lack a Federal functional regulator and is interested in identifying additional categories of such entities. However, no discussion of such entities should be thought to be exhaustive. This NPRM proposes that any entity that meets the definition of bank in 31 CFR 1010.100(d) would be required to establish an AML program.

State-Chartered Non-Depository Trust Companies

State-chartered non-depository trust companies are generally smaller than depository (or federally regulated non-depository) trust companies, and often provide estate planning and settlement and trust administration on a regional basis.[24] Trust companies can provide services similar to investment advisory firms, including securities investment advisers, but are generally exempt from registration as investment advisers with the SEC.[25] Trust companies also may provide services to clients similar to the services offered by other financial services firms. The number of state-chartered non-depository trust companies is difficult to determine; however, according to data available from state banking regulator Web sites, there are upwards of 347 of these entities.[26]

Non-Federally Insured Credit Unions

Of the more than 6,273 credit unions nationwide, FinCEN understands that there are approximately 265 state-chartered credit unions that are not federally insured. Aside from their lack of a Federal functional regulator, these credit unions generally are similar in structure to federally insured credit unions.[27]

Private Banks

A private bank is a bank chartered under state law that is owned by an individual or a partnership and generally provides financial services to individuals with high net worth.[28] Although private banks have a long history in certain jurisdictions, including Switzerland and the United Kingdom, at least one private bank remains in the United States.

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[14] *See* 67 FR 21113. Since the time of the 2002 Interim Final Rule, FinCEN has reorganized its regulations under 31 CFR Chapter X. *See* Final Rule—Transfer and Reorganization of Bank Secrecy Act Regulations, 75 FR 65806 (Oct. 26, 2010). The cited AML program requirement can currently be found at 31 CFR 1020.210, with an added cross-reference to enhanced due diligence requirements imposed by rulemakings later than the Interim Final Rule.

[15] "Private banker" is included in the list of financial institutions in the BSA. 12 U.S.C. 5312(a)(2)(C).

[16] *See* Amendment of Interim Final Rule—Anti-Money Laundering Programs for Financial Institutions, 67 FR 67547 (Nov. 6, 2002).

[17] *See* 31 CFR 1010.205(c). The deferral expires for a financial institution on the date the financial institution otherwise must comply with a final rule requiring the financial institution to establish an AML program.

[18] *See* 31 CFR 1010.205(b)(1)(vi) and (b)(2).

[19] *See* 31 CFR 1010.306–315 (CTRs); 31 CFR 1020.320 (SAR rule for banks); 31 CFR 1010.410 (records to be made and retained by financial institutions).

[20] Private banks, trust companies, and credit unions are "covered financial institutions" for purposes of 31 CFR 1010.630 and 31 CFR 1010.670, regardless of whether the institutions have a Federal functional Regulator. *See* 31 CFR 1010.605(e)(2). In contrast, rules requiring the implementation of due diligence programs for correspondent accounts and private banking accounts do not apply to private banks, apply only to "federally insured credit unions," and certain trust companies that are "federally regulated and subject to an anti-money laundering program requirement." *See* 31 CFR 1010.605(e)(1); 31 CFR 1010.610 (correspondent accounts); 31 CFR 1010.620 (private banking accounts).

[21] *See* Joint Final Rule—Customer Identification Programs for Banks, Savings Associations, Credit Unions and Certain Non-Federally Regulated Banks, 68 FR 25090 (May 9, 2003). *See* 31 CFR 1020.220.

[22] *See* Notice of Proposed Rulemaking—Customer Identification Programs for Certain Banks Lacking a Federal Functional Regulator, 68 FR 25163 (May 9, 2003).

[23] *See* Final Rules, Customer Due Diligence Rules for Financial Institutions, 81 FR 29398 (May 11, 2016).

[24] Certain trust companies and banks offering trust services are subject to safety and soundness regulation by one or more Federal banking agencies. *See, e.g.,* 12 U.S.C. 1813(a)(2), (l)(2), and (p); 12 U.S.C. 1817(i).

[25] *See* 15 U.S.C. 80b–2(a)(2) and (11)(A).

[26] We reviewed relevant information from the Web sites of state banking departments to determine the estimated number. *See http://www.csbs.org/about/what/Pages/StateBankingDepartmentLinks.aspx.*

[27] The statistics are based upon information provided in 2013 by the National Association of State Credit Union Supervisors. Federally chartered credit unions are insured by the NCUA through the National Credit Union Share Insurance Fund. *See* 12 U.S.C. 1781.

Non-Federally Insured State Banks and Savings Associations

According to estimates available from state banking regulator Web sites, the number of state-chartered banks and savings and loan or building and loan associations without Federal Deposit Insurance Corporation ("FDIC") insurance is not more than 12.[29] These banks function similarly to other federally insured banks, but are privately insured.

International Banking Entities

International banking entities, or "entidades bancarias internacionales" ("EBIs"), are not federally insured, but are authorized by Puerto Rican and the U.S. Virgin Islands law to provide banking and other services to non-resident aliens. As of 2014, 33 EBIs were licensed by Puerto Rico.[30]

D. Extension of AML Program, CIP and Beneficial Ownership Requirements

The Anti-Money Laundering Program

The statutory mandate that all financial institutions establish anti-money laundering programs is a key element in the national effort to prevent and detect money laundering and the financing of terrorism. Banks without a Federal functional regulator may be as vulnerable to the risks of money laundering and terrorist financing as banks with one. This proposed rule would eliminate the present regulatory "gap" in AML coverage between banks with and without a Federal functional regulator. FinCEN expects uniform regulatory requirements for all banks to reduce the opportunity for criminals to seek out and exploit banks subject to less rigorous AML requirements.

FinCEN also believes that imposing an AML program requirement on banks that lack a Federal functional regulator would not be unduly burdensome, given that such banks already must comply with various BSA recordkeeping, reporting, and, in some cases, CIP requirements. In order to comply with these existing rules, banks lacking a Federal functional regulator have likely developed procedures and protocol comparable to what would be required under the proposed rule.

In 2005, uniform BSA examination procedures were issued through the first publication of the Federal Financial Institutions Examination Council Bank Secrecy Act/Anti-Money Laundering Examination Manual.[31] FinCEN understands that uniform audits or examinations of policies, procedures, internal controls, reporting structures, transaction monitoring, and recordkeeping have caused many banks that lack a Federal functional regulator to adopt procedures similar to the ones that would be required under the proposed rule.

Customer Identification Program

For the reasons of regulatory consistency and protection against systemic vulnerability discussed above in connection with AML programs, FinCEN believes that CIP should also apply to all banks (including all depository institutions chartered under state banking law, even if the charter was not for a credit union, trust company, or private bank), regardless of whether they are Federally regulated. The preamble of the final CIP rule said that it applied to "banks with a Federal functional regulator and to credit unions, trust companies, and private banks without a federal functional regulator." However, on the same day that the final CIP rule was issued, FinCEN issued a follow-on Notice of Proposed Rulemaking to ensure that there would be no gaps in the scope of the CIP obligations as they apply to banks.[32] Because this proposal was never finalized, FinCEN is also re-proposing changes that would explicitly require all banks that lack a Federal functional regulator to establish CIP.

Beneficial Ownership Requirements

As noted above, the CDD Rule requires that federally regulated banks and certain other financial institutions identify, and verify the identity of, the beneficial owners of their legal entity customers, as set forth in section 1010.230.[33] For purposes of regulatory consistency, FinCEN believes that this requirement should apply to non-federally regulated banks as well.

II. Section-by-Section Analysis

This notice proposes to amend chapter X by adding AML program requirements for banks that lack a Federal functional regulator, and extending CIP and beneficial ownership requirements to those banks not already subject to these requirements. These proposed changes include the following: (1) Amending the provision in § 1010.205 that exempts certain financial institutions from the requirement to establish an AML program; (2) amending the definition of covered financial institution in § 1010.605 so that non-federally regulated banks will be subject to the beneficial ownership requirements pursuant to the CDD Rule (as well as the requirements in §§ 1010.610 and 1010.620); (3) removing the substantive language in the definitions of bank and financial institution in part 1020, Rules for Banks, because there will no longer be a need to make distinctions from the definitions in part 1010's General Definitions; (4) imposing AML program requirements on banks that lack a Federal functional regulator and prescribing minimum standards for the AML programs; and (5) amending the CIP requirements to delete a specific requirement that until banks without a Federal functional regulator are subject to AML program requirements they must have their CIPs approved by their boards of directors. If the proposed changes are implemented, banks without a Federal functional regulator will be required to implement a written AML program approved by their boards of directors or by equivalent functional units within the banks.

A. Exempted Anti-Money Laundering Programs for Certain Financial Institutions

Section 1010.205 provides temporary exemptions for certain financial institutions from the requirement to establish an anti-money laundering program.[34] The proposed amendments to 31 CFR 1010.205 reflect the removal of: (1) The exemption for private bankers (§ 1010.205(b)(1)(vi)); (2) the broader exemption for banks that lack a Federal functional regulator (§ 1010.205(b)(2)); and (3) the exemption for persons subject to supervision by a state banking authority (§ 1010.205(b)(3)).

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[28] Private banks should be distinguished from private banking *accounts.* A "private banking account" for purposes of rules implementing section 312 of the USA PATRIOT Act includes any account—at any kind of bank—that is established for certain individuals who are not United States citizens, provided the account requires a minimum aggregate deposit of $1,000,000 or more and the account is administered by an officer, employee, or agent of the covered financial institution acting as a liaison with the direct or beneficial owner of the account. *See* 31 CFR 1010.605(m). The rules implementing section 312 of the USA PATRIOT Act do not apply to private banks *per se.*

[29] *See supra* note 26.

[30] *See* Commissioner of Financial Institutions of Puerto Rico *http://www.ocif.gobierno.pr/documents/cons/EBI.pdf.>*

[31] The Federal Financial Institutions Examination Council is a formal interagency body consisting of the Federal banking agencies authorized to prescribe uniform standards for the examination of financial institutions. *See http://www.ffiec.gov/.* Regulators from forty-seven state regulators, the District of Columbia, and the Commonwealth of Puerto Rico conduct AML compliance inspections in conjunction with the Federal banking agencies. Similarly, credit unions are subject to joint supervision by the NCUA and their state supervisors, pursuant to a Document of Cooperation executed by the NCUA and the National Association of State Credit Union Supervisors.

[32] *See supra* note 22.

[33] The CDD Rule is effective July 11, 2016 and applicable on and after May 11, 2018.

B. General and Specific Definitions

General rules that apply to all industries appear in part 1010, and industry-specific rules are contained in other parts within chapter X. Because the definition of bank in part 1010 makes no distinctions as to whether a bank has a Federal functional regulator, there are no proposed changes to that definition of bank in § 1010.100(d).[35] Likewise, there are no proposed changes to the general definition of financial institution in § 1010.100(t).[36] Specific rules for banks are contained in part 1020, which includes definitions of both "bank" and "financial institution" specific to that part, to note a distinction in the application of AML program and CIP requirements between banks with a Federal functional regulator and those lacking one. FinCEN proposes to amend those definitions, as described below.

Customer Identification Program Requirement

The separate definition of bank in § 1020.100(b) reflects the fact that existing CIP requirements do not apply to all banks that lack a Federal functional regulator. The current definition of *bank,* for the purposes of 31 CFR 1020.220, is (1) A bank, as that term is defined in 31 CFR 1010.100(d), that is subject to regulation by a Federal functional regulator; and (2) A credit union, private bank, and trust company, as set forth in 31 CFR 1010.100(d) of this chapter, that does not have a Federal functional regulator.[37]

This rulemaking proposes to remove existing § 1020.100(b), which would result in making all banks, regardless of whether they are subject to regulation by a Federal functional regulator, comply with CIP requirements.

Beneficial Ownership Requirement

The beneficial ownership requirement in the CDD Rule applies to covered financial institutions as defined in § 1010.605(e)(1). This definition includes several types of banks, all of which are federally regulated,[38] as well as brokers and dealers in securities, futures commission merchants and introducing brokers, and mutual funds. In order to apply this requirement to non-federally regulated banks, this rulemaking proposes to amend the current definition of covered financial institution by replacing paragraphs (i) through (vii) of § 1010.605(e)(1) with the following, which includes all banks (whether or not federally regulated) that are subject to an AML program requirement "a bank required to have an anti-money laundering compliance program under the regulations implementing 31 U.S.C. 5318(h), 12 U.S.C. 1818(s), or 12 U.S.C. 1786(q)(1)."

Anti-Money Laundering Program Requirement

The definition of financial institution in § 1020.100(d) reflects the fact that existing AML program requirements are based on whether a bank is subject to regulation by a Federal functional regulator. The current definition of *financial institution* is (1) For the purposes of 31 CFR 1020.210, a financial institution is defined in 31 U.S.C. 5312(a)(2) or (c)(1) that is subject to regulation by a Federal functional regulator or a self-regulatory organization; (2) For the purposes of 31 CFR 1020.220, a financial institution is defined in 31 U.S.C. 5312(a)(2) or (c)(1).

This rulemaking proposes to remove existing § 1020.100(d)(1), which along with the proposed amendments to § 1020.210 described below, would result in requiring all banks, regardless of whether they are subject to regulation by a Federal functional regulator, to comply with the obligation to implement an AML program.[39]

C. AML Program Requirements

Section 1020.210 (as amended by the CDD Rule) sets forth the current AML program requirements for banks. This rulemaking proposes certain changes necessary to ensure that all banks, regardless of whether they are subject to Federal regulation and oversight, are required to establish and implement anti-money laundering programs. One proposed change concerns the title and structure of the section. Currently, the title reads: "Anti-money laundering program requirements for financial institutions regulated only by a Federal functional regulator, including banks, savings associations, and credit unions." With the proposed change, the title would read: "Anti-money laundering program requirements for banks," and it would contain one section for banks regulated only by a Federal functional regulator and another section for banks that lack a Federal functional regulator.

As proposed, § 1020.210(a) would be titled: "Anti-money laundering program requirements for banks regulated only by a Federal functional regulator, including banks, savings associations, and credit unions." The existing language in § 1020.210 states that compliance by a financial institution regulated by a Federal functional regulator that is not subject to the regulations of a self-regulatory organization satisfies the AML program requirement under 31 U.S.C. 5318(h)(1) if its program complies with the requirements of §§ 1010.610 and 1010.620 and the regulations of its Federal functional regulator governing AML programs. FinCEN is unaware of any instance in which a bank is subject to regulations by a self-regulatory organization. Accordingly, FinCEN proposes to remove reference to such regulation from the regulatory text, by striking the words "that is not subject to the regulations of a self-regulatory organization." This proposed change would appear in § 1020.210(a).[40]

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[34] *See* 67 FR 21113 (Apr. 29, 2002), *as amended at* 67 FR 67549 (Nov. 6, 2002) and *corrected at* 67 FR 68935 (Nov. 14, 2002) (Treasury temporarily exempted private bankers and banks not subject to regulation by a Federal functional regulator from establishing an AML program).

[35] Bank is defined in 31 CFR 1010.100(d) as each agent, agency, branch, or office within the United States of any person doing business in one or more of the capacities listed: (1) A commercial bank or trust company organized under the laws of any state or of the United States; (2) A private bank; (3) A savings and loan association or a building and loan association organized under the laws of any state or of the United States; (4) An insured institution as defined in section 401 of the National Housing Act; (5) A savings bank, industrial bank or other thrift institution; (6) A credit union organized under the law of any state or of the United States; (7) Any other organization (except a money services business) chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state; (8) A bank organized under foreign law; (9) Any national banking association or corporation acting under the provisions of section 25(a) of the Act of Dec. 23, 1913, as added by the Act of Dec. 24, 1919, ch. 18, 41 Stat. 378, as amended (12 U.S.C. 611–32).

[36] 31 CFR 1010.100(t) defines financial institution as each agent, agency, branch, or office within the United States of any person doing business, whether or not on a regular basis or as an organized business concern, in one or more of the capacities listed below: (1) A bank (except bank credit card systems); (2) A broker or dealer in securities; (3) A money services business as defined in § 1010.100(ff); (4) A telegraph company; (5) Casino; (6) Card club; (7) A person subject to supervision by any state or Federal bank supervisory authority; (8) A futures commission merchant; (9) An introducing broker in commodities; or (10) A mutual fund.

[37] *See* 31 CFR 1020.100(b).

[38] These include (1) An insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)); (2) A commercial bank; (3) An agency or branch of a foreign bank; (4) A federally insured credit union; (5) A savings association; (6) A corporation acting under section 25A of the Federal Reserve Act; and (7) A trust bank or trust company that is federally regulated and is subject to an anti-money laundering program requirement.

[39] We are also proposing to remove § 1020.100(d)(2). Due to the current definition of "financial institution" in § 1010.100(t), this broader definition of the term is no longer necessary.

Proposed new § 1020.210(b) would be titled: "Anti-money laundering program requirements for banks lacking a Federal functional regulator including, but not limited to, private banks, non-federally insured credit unions, and certain trust companies." New § 1020.210(b)(1) would require banks that lack a Federal functional regulator to establish and implement AML programs reasonably designed to assure ongoing compliance with the Bank Secrecy Act. Section 1020.210(b)(1)(ii)(E) would require compliance with due diligence requirements for correspondent accounts for foreign financial institutions (§ 1010.610) and for private banking accounts (§ 1010.620), and new § 1020.210(b)(1) also would prescribe the minimum standards necessary for an AML program.

With respect to minimum standards, proposed § 1020.210(b)(1)(ii)(A) would require that the AML program include a system of internal controls to assure ongoing compliance with the BSA. As part of implementing an AML program, FinCEN would expect banks that lack a Federal functional regulator to assess the money laundering and terrorist financing risks that are associated with their products, customers, distribution channels, and geographic locations. An assessment of customer-related information is a key component to a robust AML program, and banks must ensure that they obtain all the information necessary for their AML program requirements. For purposes of making the required risk assessment, banks have discretion to determine how best to collect the relevant customer information. FinCEN does not anticipate that this requirement will entail obtaining information not already obtained in the ordinary course of business. Policies, procedures, and internal controls also must be reasonably designed to ensure compliance with BSA requirements. Banks may conduct some of their operations through agents and third-party service providers. Some elements of the compliance program may best be performed by personnel of these entities, in which case it is permissible for banks to contract with such entities to assist them with implementation and operation of those aspects of its AML program. Any bank that contracts with an agent or third party to assist with aspects of its AML program, however, remains fully responsible for the effectiveness of the program, as well as ensuring that compliance examiners are able to obtain information and records relating to the AML program.

Proposed § 1020.210(b)(1)(ii)(B) would require that the program provide for independent testing to monitor and maintain an adequate program. A party external to the bank, such as an outside consultant or accountant, need not perform the testing. The testing may be conducted by an officer, employee, or group of employees, so long as the person or persons conducting the testing are independent of the person or group of persons primarily responsible for implementing the bank's AML program. The frequency of independent testing will depend upon the risks posed.[41] Any recommendations that result from the independent testing should be implemented promptly or reviewed by senior management.

Proposed § 1020.210(b)(1)(ii)(C) would require that the bank designate a person or persons who will be responsible for coordinating and monitoring day-to-day compliance with the AML program. The bank may have one individual, or the bank may designate multiple individuals to perform the function as a group. The person or persons should be competent and knowledgeable regarding BSA requirements and money laundering issues and risks, and should be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures. The role of this function is to ensure that the program is implemented effectively and updated as necessary.

Proposed § 1020.210(b)(1)(ii)(D) would require that the program provide for training of appropriate persons. Employee training is an integral part of any AML program. In order to carry out their responsibilities effectively, employees must be trained in requirements under the BSA and money laundering risks generally, as well as the internal policies and procedures of the institution, so that red flags can be identified. Such training may be conducted by third parties or in-house, and may include computer-based training. Employees should receive periodic updates and refreshers to such training. The nature, scope, and frequency of training would depend upon the functions performed by employees.

Proposed § 1020.210(b)(1)(ii)(E) would require that the program include, at a minimum, appropriate risk-based procedures for conducting ongoing customer due diligence, to include, but not be limited to, understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile; and conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information. For purposes of this proposed paragraph, customer information would include information regarding the beneficial owners of legal entity customers (as defined in § 1010.230). FinCEN views this not as a new requirement, but as an explicit statement of the activities that are already required of covered financial institutions in order to monitor for, and detect and report, suspicious transactions.[42]

Proposed § 1020.210(b)(2) would require that an AML program be approved by the bank's board of directors or, if the bank does not have a board of directors, an equivalent function within the bank. Additionally, a bank would be required to make a copy of its AML program available to FinCEN or its designee upon request.[43]

D. CIP Requirements

Currently, the title reads: Section 1020.220, "Customer identification programs for banks, savings associations, credit unions, and certain non-Federally regulated banks." With the proposed change, the title would read: "Customer identification program requirements for banks." This proposed change recognizes that going forward CIP requirements would apply to all banks.

The proposed changes would also delete an unnecessary reference in § 1020.220 that stipulates that credit unions, private banks, and trust companies without a Federal functional regulator must seek board approval for their CIPs. With finalization of this proposal, banks lacking a Federal functional regulator would be required to implement a written AML program approved by their boards of directors. Since CIP would be part of their AML programs, which must be approved by their boards of directors, it would no longer be necessary to stipulate a separate approval of CIP in this section.

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[40] The regulation text set forth is the text as amended by the CDD Rule, which is effective July 11, 2016 and applicable on and after May 11, 2018.

[41] *See* The Federal Financial Institutions Examination Council, Bank Secrecy Act/Anti-Money Laundering Examination Manual, at 30 (2014) *available at https://www.ffiec.gov/bsa_aml_infobase/documents/BSA_AML_Man_2014_v2.pdf* ("[A] sound practice is for the bank to conduct independent testing generally every 12 to 18 months, commensurate with the BSA/AML risk profile of the bank.").

[42] For a description of what is required by this new provision in the AML program rule for banks, *see* CDD Rule, 81 FR 29398, 29419–29421.

[43] An agency with authority delegated by FinCEN to examine the bank for compliance with the BSA would qualify as a designee of FinCEN.

III. Request for Comment

FinCEN welcomes comment on all aspects of the proposed rule. In addition, FinCEN seeks comment on the following issues:

- Whether certain banks lacking a Federal functional regulator should be excluded from the proposed rule;
- Whether there are additional bank categories that should be included in the proposed rule;
- Whether non-federally regulated banks should be subject to the requirements contained in the CDD Rule;
- If the requirements contained in the CDD Rule and under Section 312 are imposed on non-federally regulated banks, what time period should be given to these institutions to implement such requirements; and
- Whether there are banks that are, in fact, regulated by self-regulatory organizations.

IV. Initial Regulatory Flexibility Act Analysis

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (''RFA'') requires the agency to ''prepare and make available for public comment an initial regulatory flexibility analysis'' that will ''describe the impact of the proposed rule on small entities.'' (5 U.S.C. 603(a).) Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

A. Reasons Why Action by the Agency Is Being Considered

The Anti-Money Laundering Program

The statutory mandate that all financial institutions establish anti-money laundering programs is a key element in the national effort to prevent and detect money laundering and the financing of terrorism. Banks without a Federal functional regulator may be as vulnerable to the risks of AML and terrorist financing as banks with one. This proposed rule would eliminate the present regulatory ''gap'' in AML coverage between banks with and without a Federal functional regulator. FinCEN expects that uniform regulatory requirements for all banks will reduce the opportunity for criminals to seek out and exploit banks subject to less rigorous AML requirements.

Customer Identification Program

For the reasons of regulatory consistency and protection against systemic vulnerability discussed above in connection with AML programs, FinCEN believes that CIP should also apply to all banks (including all depository institutions chartered under state banking law, even if the charter was not for a credit union, trust company, or private bank), regardless of whether they are Federally regulated. In July 2002, FinCEN issued a Notice of Proposed Rulemaking to ensure that there would be no gaps in the scope of the CIP obligations as they apply to banks. Because this proposal was never finalized, FinCEN is also re-proposing changes that would explicitly require all banks that lack a Federal functional regulator to establish CIP.

Beneficial Ownership Requirements

As noted above, the CDD Rule requires that from and after May 11, 2018, federally regulated banks and certain other financial institutions identify, and verify the identity of, the beneficial owners of their legal entity customers, as set forth in section 1010.230. For purposes of regulatory consistency, FinCEN believes that this requirement should apply to non-federally regulated banks as well.

B. Objectives of, and Legal Basis for, the Proposed Rules

Section 352 of the USA PATRIOT Act requires financial institutions to establish AML programs that, at a minimum, include: (1) The development of internal policies, procedures, and controls; (2) the designation of a compliance officer; (3) an ongoing employee training program; and (4) an independent audit function to test programs. In addition, the CDD Rule described above adds an explicit requirement to conduct ongoing monitoring.

Section 326 of the USA PATRIOT Act requires FinCEN to prescribe regulations that require financial institutions to establish programs for account opening that, at a minimum, include: (1) Verifying the identity of any person seeking to open an account, to the extent reasonable and practicable; (2) maintaining records of the information used to verify the person's identity, including name, address, and other identifying information; and (3) determining whether the person appears on any lists of known or suspected terrorists or terrorist organizations provided to the financial institution by any government agency.

Section 312 of the USA PATRIOT Act requires each U.S. financial institution that establishes, maintains, administers, or manages a correspondent account or a private banking account in the United States for a non-U.S. person to subject such accounts to certain anti-money laundering measures.

C. Small Entities Subject to the Proposed Rules

Based upon current data, for the purposes of RFA, FinCEN estimates that these rules will impact approximately 347 state chartered non-depository trust companies; 265 state-chartered credit unions that are not federally insured; 12 state-chartered banks and savings and loan or building and loan associations without FDIC insurance; and 115 EBIs licensed in Puerto Rico.[44] FinCEN believes it is likely that most or all of the non-federally insured credit unions are small entities, and has no data on the size of the other entities subject to this rulemaking, and therefore assumes that many of them are small entities. Therefore, FinCEN concludes that the proposed rules will apply to a substantial number of small entities.

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rules

The proposed rules would prescribe minimum standards for AML programs for banks without a Federal functional regulator to ensure that all banks, regardless of whether they are subject to Federal regulation and oversight, are required to establish and implement written AML programs, including conducting ongoing customer due diligence, and to identify and verify the identity of the beneficial owners of their legal entity customers. The changes would also extend customer identification program requirements to those banks not already subject to these requirements.

Banks lacking a Federal functional regulator are currently required to comply with many existing requirements under the BSA. All banks, including those not subject to Federal regulation and oversight, are already required to file SARs, which necessarily requires a bank to establish a process to detect unusual activity. Certain banks lacking a Federal functional regulator—namely, private banks, non-federally insured credit unions, and certain trust companies—must maintain CIPs.

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[44] The Small Business Administration (''SBA'') defines a trust company as a small business if it has assets of $35.5 million or less. The SBA defines a depository institution (including a credit union) as a small business if it has assets of $550 million or less. FinCEN was unable to find an authoritative figure on the number of non-federally regulated depository institutions that would meet the definition of small entity.

Uniform audits at the state and Federal levels may have caused banks lacking a Federal functional regulator to adopt procedures similar to the ones that would be required under the AML program requirement of the proposed rule.

With respect to the beneficial ownership requirement, the proposed rule would require banks lacking a Federal functional regulator to obtain and maintain the identity of each beneficial owner from each legal entity customer that opens a new account, including name, address, date of birth and identification number. The financial institution would also be required to verify such identity by documentary or non-documentary methods and to maintain in its records for five years a description of (1) any document relied on for verification, (2) any such non-documentary methods and results of such measures undertaken, and (3) the resolution of any substantive discrepancies discovered in verifying the identification information.

The burden on a small non-federally regulated bank at account opening resulting from the final rule would be a function of the number of beneficial owners of each legal entity customer opening a new account, the additional time required for each beneficial owner, and the number of new accounts opened for legal entities by the small banks during a specified period.

None of the small businesses that commented on the CDD Rule's Initial Regulatory Flexibility Analysis ("IRFA") included an estimate of the amount of time to open a legal entity account; only one noted the number of such accounts it opens per year (70). As a result of the comments FinCEN received to the CDD Rule's-related regulatory impact assessment from other commenters, FinCEN concluded in its Final Regulatory Flexibility Analysis ("FRFA")[45] that the estimated time for financial institutions to open accounts ranges from 20 to 40 minutes. Based on opening 471 new accounts for legal entities and an average wage of $16.77 for "new account clerks,"[46] this would result in an annual cost to a small bank of $2,550 to $5,100.[47] FinCEN also notes that, even among small entities, the costs could be expected to vary substantially.[48]

In addition, compliance with the beneficial ownership requirement would be expected to require additional training, information technology upgrades, and revisions to policies, procedures, and internal controls. A discussion of the estimated costs for these tasks for small entities is included in the CDD Rule FRFA referred to above.

E. Overlapping or Conflicting Federal Rules

FinCEN is unaware of any existing Federal regulations that would overlap or conflict with the amendments being proposed.

F. Consideration of Significant Alternatives

FinCEN has not identified any alternative means for bringing these categories of non-federally regulated banks into compliance with the same standards as all other banks in the United States. Were FinCEN to exempt small entities from this requirement, those entities would potentially be at greater risk of abuse by money launderers and other financial criminals.

With respect to the CDD pillar of the AML program rule, FinCEN considered several alternatives to that which is being proposed. As described in greater detail elsewhere,[49] these alternatives included exempting small financial institutions below a certain asset or legal entity customer threshold from the requirements, as well as utilizing a lower (*e.g.,* 10 percent) or higher (*e.g.,* 50 percent) threshold for the minimum level of equity ownership for the definition of beneficial owner. FinCEN determined, however, that identifying the beneficial owner of a financial institution's legal entity customers and verifying that identity are necessary parts of an effective AML program. Were FinCEN to exempt small entities from this requirement, or entities that establish fewer than a limited number of accounts for legal entities, those financial institutions would be at greater risk of abuse by money launderers and other financial criminals, as criminals would identify institutions without this requirement. FinCEN also considered increasing the threshold for ownership of equity interests in the definition of beneficial ownership to 50 percent or more of the equity interests. Although this higher threshold would reduce the number of individuals whose identity would need to be verified from five to three, thus reducing marginally the onboarding time, this change would not impact the training or IT costs, and therefore, would not substantially reduce the overall costs of the rule and also would provide less useful information. After considering all the alternatives FinCEN has concluded that an ownership threshold of 25 percent is appropriate to maximize the benefits of the requirement while minimizing the burden.

G. Questions for Comment

Please provide comment on any or all of the provisions of the proposed rule with regard to their economic impact on small entities, and what less burdensome alternatives, if any, FinCEN should consider.

V. Unfunded Mandates Act

Section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), Public Law 104–4 (March 22, 1995), requires that an agency prepare a budgetary impact statement before promulgating a rule that may result in expenditure by the State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 202 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. Taking into account the factors noted above and using conservative estimates of average labor costs in evaluating the cost of the burden imposed by the proposed regulation, FinCEN has determined that it is not required to prepare a written statement under section 202.

VI. Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It has been determined that this is not a significant regulatory action for purposes of Executive Order 12866. Accordingly, a regulatory impact analysis is not required.

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[45] *See* 81 FR 29398, 29448 (May 11, 2016).

[46] *See* 81 FR 29398, 29448, n. 179, (May 11, 2016).

[47] The estimated cost is based on the bank-reported 471 new accounts per year, additional time at account opening of 15 to 30 minutes, and the average wage of $16.77 for the financial industry "new account clerks" reported by the Bureau of Labor Statistics.

[48] For example, for the small bank that responded to the CDD IRFA and estimated that it opens 70 new accounts for business customers per year, the estimated costs would range from $380 to $760 per year. *See* 81 FR 29398, 29447–48 (May 11, 2016).

[49] *See* 81 FR 29398, 29450 (May 11, 2016).

VII. Paperwork Reduction Act

The collection of information contained in this proposed rule is being submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent (preferably by fax (202–395–6974)) to the Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1506), Washington, DC 20503, or by the Internet to *OIRA_submission@omb.eop.gov,* with a copy to FinCEN by mail or the Internet. Comments on the collection of information should be received by October 24, 2016.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information subject to the Paperwork Reduction Act unless it displays a valid control number assigned by the Office of Management and Budget.

The collection of information in the proposed rule would be codified at 31 CFR 1020.210, 1020.220, and 1020.230. The information will be used by examining agencies to verify compliance with these provisions. The collection of information is mandatory. Records required to be retained under the BSA must be retained for five years.

Description of Recordkeepers: Banks without a Federal functional regulator, as defined in 31 CFR 1020.210 and 1020.220.

Estimated Number of Affected Institutions: 1,151.

Estimated Average Annual Burden Hours per Recordkeeper: Since this is a new requirement, the estimated average burden associated with the recordkeeping requirement in this proposed rule is 40 hours for development of a written program, and following the initial development, the program must be reviewed on an annual basis, to include a one (1) hour per year burden recognized for annual maintenance and update.

Estimated Total Annual Reporting Burden: 46,040 hours.

This burden will be added to the existing burden listed under OMB Control Number 1506–0035 currently titled AML Programs for insurance companies and loan and finance companies. The new title for this control number will be AML Programs for insurance companies, and residential mortgage lenders and originators, and banks that lack a Federal functional regulator. The new total burden will be 140,240 hours.

Questions for comment: (1) Whether the collection of information is necessary for the proper performance of FinCEN's mission, including whether the information will have practical utility; (2) Whether FinCEN's estimate of the burden of the collection of information is accurate; (3) What are ways to enhance the quality, utility, and clarity of the information to be collected; (4) What are ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology; (5) What are the estimates of capital or start-up costs to implement and then maintain an AML program; (6) How many banks that lack a Federal functional regulator are considered "small businesses" because the entities have less than $550 million in total assets; (7) What is the average number of employees or the average total annual salary expense for banks that lack a Federal functional regulator; and (8) What is the average number of employees dedicated to bank regulation compliance.

List of Subjects in 31 CFR Parts 1010 and 1020

Administrative practice and procedure, Banks, banking, Brokers, Currency, Foreign banking, Foreign currencies, Gambling, Investigations, Penalties, Reporting and recordkeeping requirements, Securities, Terrorism.

Authority and Issuance

For the reasons set forth in the preamble, parts 1010 and 1020 of chapter X of title 31 of the Code of Federal Regulations are proposed to be amended as follows:

PART 1010—GENERAL PROVISIONS

■ 1. The authority citation for part 1010 continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, sec. 314, Public Law 107–56, 115 Stat. 307.

§ 1010.205 [Amended]

■ 2. Section 1010.205 is amended by:
■ a. Removing paragraph (b)(1)(vi);
■ b. Redesignating paragraphs (b)(1)(vii) through (ix) as paragraphs (b)(1)(vi) through (viii); and
■ c. Removing and reserving paragraph (b)(2) and removing paragraph (b)(3).
■ 3. Section 1010.605 is amended by:
■ a. Revising paragraph (e)(1)(i)
■ b. Removing paragraphs through (e)(1)(ii) through (vii); and
■ b. Redesignating paragraphs (e)(1)(viii) through (x) as paragraphs (e)(1)(ii) through (iv).

The revision reads as follows:

§ 1010.605 Definitions.

* * * * *

(e) * * *

(i) A bank required to have an anti-money laundering compliance program under the regulations implementing 31 U.S.C. 5318(h), 12 U.S.C. 1818(s), or 12 U.S.C. 1786(q)(1);

* * * * *

PART 1020—RULE FOR BANKS

■ 4. The authority citation for part 1020 continues to read as follows:

Authority: 12 U.S.C. 1829b and 1951–1959; 31 U.S.C. 5311–5314 and 5316–5332; title III, sec. 314, Public Law 107–56, 115 Stat. 307.

§ 1020.100 [Amended]

■ 5. Section 1020.100 is amended by:
■ a. Removing paragraphs (b) and (d); and
■ b. Redesignating paragraph (c) as paragraph (b).
■ 6. Section 1020.210 is revised to read as follows:

§ 1020.210 Anti-money laundering program requirements for banks.

(a) *Anti-money laundering program requirements for banks regulated only by a Federal functional regulator, including banks, savings associations, and credit unions.* A bank regulated by a Federal functional regulator shall be deemed to satisfy the requirements of 31 U.S.C. 5318(h)(1) if it implements and maintains an anti-money laundering program that:

(1) Complies with the requirements of §§ 1010.610 and 1010.620 of this chapter;

(2) Includes, at a minimum:

(i) A system of internal controls to assure ongoing compliance;

(ii) Independent testing for compliance to be conducted by bank personnel or by an outside party;

(iii) Designation of an individual or individuals responsible for coordinating and monitoring day-to-day compliance;

(iv) Training for appropriate personnel; and

(v) Appropriate risk-based procedures for conducting ongoing customer due diligence, to include, but not be limited to:

(A) Understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile; and

(B) Conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information. For purposes of this paragraph, customer information shall include information regarding the beneficial owners of legal entity customers (as defined in § 1010.230); and

(3) Complies with the regulation of its Federal functional regulator governing such programs.

(b) *Anti-money laundering program requirements for banks lacking a Federal functional regulator including, but not limited to, private banks, non-federally insured credit unions, and certain trust companies.* (1) A bank lacking a Federal functional regulator shall be deemed to satisfy the requirements of 31 U.S.C. 5318(h)(1) if the bank establishes and maintains a written anti-money laundering program that:

(i) Complies with the requirements of §§ 1010.610 and 1010.620 of this chapter; and

(ii) Includes, at a minimum:

(A) A system of internal controls to assure ongoing compliance with the Bank Secrecy Act and the regulations set forth in 31 CFR chapter X;

(B) Independent testing for compliance to be conducted by bank personnel or by an outside party;

(C) Designation of an individual or individuals responsible for coordinating and monitoring day-to-day compliance;

(D) Training for appropriate personnel; and

(E) Appropriate risk-based procedures for conducting ongoing customer due diligence, to include, but not be limited to:

(*1*) Understanding the nature and purpose of customer relationships for the purpose of developing a customer risk profile; and

(*2*) Conducting ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information. For purposes of this paragraph, customer information shall include information regarding the beneficial owners of legal entity customers (as defined in § 1010.230).

(2) The program must be approved by the board of directors or, if the bank does not have a board of directors, an equivalent governing body within the bank. The bank shall make a copy of its anti-money laundering program available to the Financial Crimes Enforcement Network or its designee upon request.

■ 7. Amend § 1020.220 by revising the section heading and paragraph (a)(1) to read as follows:

§ 1020.220 Customer identification program requirements for banks.

(a) * * * (1) *In general.* A bank required to have an anti-money laundering compliance program under the regulations implementing 31 U.S.C. 5318(h), 12 U.S.C. 1818(s), or 12 U.S.C. 1786(q)(1) must implement a written Customer Identification Program (CIP) appropriate for its size and type of business that, at a minimum, includes each of the requirements of paragraphs (a)(1) through (5) of this section. The CIP must be a part of the anti-money laundering compliance program.

* * * * *

Jamal El-Hindi,

Acting Director, Financial Crimes Enforcement Network.

[FR Doc. 2016–20219 Filed 8–24–16; 8:45 am]

BILLING CODE 4810–02–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2016–0377; FRL–9951–33–Region 8]

Approval and Promulgation of Air Quality Implementation Plans; State of Wyoming; Emission Inventory Rule for 2008 Ozone NAAQS and Revisions to Incorporation by Reference

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve State Implementation Plan (SIP) revisions submitted by the State of Wyoming on July 1, 2014. The submittal requests SIP revisions to the State's Incorporation by reference section as well as an administrative change in section numbering. The SIP also includes the addition of a section establishing requirements for the submittal of emission inventories from facilities or sources located in an ozone nonattainment area.

DATES: Written comments must be received on or before September 26, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2016–0377, at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Chris Dresser, Air Program, U.S. Environmental Protection Agency, Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6385, *dresser.chris@epa.gov.*

SUPPLEMENTARY INFORMATION: In the "Rules and Regulations" section of this **Federal Register**, the EPA is approving the State's SIP revision as a direct final rule without prior proposal because the agency views this as a noncontroversial SIP revision and anticipates no adverse comments. A detailed rationale for the approval is set forth in the preamble to the direct final rule.

If the EPA receives no adverse comments, the EPA will not take further action on this proposed rule. If the EPA receives adverse comments, the EPA will withdraw the direct final rule and it will not take effect. The EPA will address all public comments in a subsequent final rule based on this proposed rule.

The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information, please see the **ADDRESSES** section of this notice.

Please note that if the EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, the EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. See the information provided in the Direct Final action of the same title which is located in the Rules and Regulations Section of this **Federal Register**.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: August 11, 2016.

Debra Thomas,

Deputy Regional Administrator, Region 8.

[FR Doc. 2016–20316 Filed 8–24–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2016–0169; FRL–9951–28–Region 5]

Air Plan Approval; Indiana; RACM Determination for Indiana Portion of the Cincinnati-Hamilton 1997 Annual $PM_{2.5}$ Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve the reasonably available control measures (RACM) and reasonably available control technology (RACT) analysis that Indiana submitted as part of their earlier attainment plan for the 1997 fine particulate matter ($PM_{2.5}$) standard, in accordance with Indiana's request dated February 11, 2016. The RACM/RACT analysis addresses RACM and RACT for the Indiana portion of the Cincinnati-Hamilton nonattainment area for the 1997 $PM_{2.5}$ standard. EPA is not proposing to act on the portions of the state implementation plan (SIP) revision that are unrelated to RACM/RACT. Other portions of the attainment plan have either been addressed or will be addressed in future rulemaking actions.

DATES: Comments must be received on or before September 26, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2016–0169 at *http://www.regulations.gov* or via email to *aburano.douglas@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Joseph Ko, Environmental Engineer, Attainment, Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–7947, *ko.joseph@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Rules and Regulations section of this **Federal Register**, EPA is approving the state's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the Rules and Regulations section of this **Federal Register**.

Dated: August 9, 2016.

Robert Kaplan,

Acting Regional Administrator, Region 5.

[FR Doc. 2016–20311 Filed 8–24–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2016–0368; FRL–9951–26–Region 3]

Determination of Attainment by the Attainment Date for the 2008 Ozone National Ambient Air Quality Standards; Pennsylvania; Pittsburgh-Beaver Valley

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to determine that the Pittsburgh-Beaver Valley, Pennsylvania marginal ozone nonattainment area (the Pittsburgh Area) has attained the 2008 ozone national ambient air quality standards (NAAQS) by the July 20, 2016 attainment date. This proposed determination is based on complete, certified, and quality assured ambient air quality monitoring data for the Pittsburgh Area for the 2013–2015 monitoring period. This proposed determination does not constitute a redesignation to attainment. This action is being taken under the Clean Air Act (CAA).

DATES: Written comments must be received on or before September 26, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–OAR–2016–0368 at *http://www.regulations.gov,* or via email to *fernandez.cristina@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Maria A. Pino, (215) 814–2181, or by email at *pino.maria@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Requirement—Determination of Attainment by the Attainment Date

Section 181(b)(2) of the CAA requires EPA to determine, within 6 months of an ozone nonattainment area's attainment date, whether that area attained the ozone standard by that date. Section 181(b)(2) of the CAA also requires that areas that have not attained the standard by their attainment deadlines be reclassified to either the next higher classification (*e.g.,* marginal to moderate, moderate to serious, etc.) or to the classifications applicable to the areas' design values in Table 1 of 40 CFR 51.1103. CAA section 181(a)(5) provides a mechanism by which the EPA Administrator may grant a 1-year extension of an area's attainment deadline, provided that the relevant states meet certain criteria.

B. The Pittsburgh Area and Its Attainment Date

On July 18, 1997, EPA promulgated a revised ozone NAAQS of 0.08 parts per million (ppm), averaged over eight hours. 62 FR 38855. This standard was determined to be more protective of public health than the previous 1979 1-hour ozone standard. In 2008, EPA revised the 8-hour ozone NAAQS from 0.08 to 0.075 ppm (the 2008 ozone NAAQS). *See* 73 FR 16436 (March 27, 2008). In a May 21, 2012 final rule, the Pittsburgh Area was designated as marginal nonattainment for the more stringent 2008 ozone NAAQS, effective on July 20, 2012. 77 FR 30088. The Pittsburgh Area consists of Allegheny, Armstrong, Beaver, Butler, Fayette, Washington, and Westmoreland Counties in Pennsylvania. *See* 40 CFR 81.339.

In a separate rulemaking action, also published on May 21, 2012 and effective on July 20, 2012, EPA established the air quality thresholds that define the classifications assigned to all nonattainment areas for the 2008 ozone NAAQS (the Classifications Rule). 77 FR 30160. This rule also established December 31 of each relevant calendar year as the attainment date for all nonattainment area classification categories. Section 181 of the CAA provides that the attainment deadline for ozone nonattainment areas is "as expeditiously as practicable" but no later than the prescribed dates that are provided in Table 1 of that section. In the Classifications Rule, EPA translated the deadlines in Table 1 of CAA section 181 for purposes of the 2008 standard by measuring those deadlines from the effective date of the new designations, but extended those deadlines by several months to December 31 of the corresponding calendar year. Pursuant to a challenge of EPA's interpretation of the attainment deadlines, on December 23, 2014, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued a decision rejecting, among other things, the Classifications Rule's attainment deadlines for the 2008 ozone nonattainment areas, finding that EPA did not have statutory authority under the CAA to extend those deadlines to the end of the calendar year. *NRDC* v. *EPA,* 777 F.3d 456, 464–69 (D.C. Cir. 2014). Accordingly, as part of the final SIP Requirements Rule for the 2008 ozone NAAQS (80 FR 12264, March 6, 2015), EPA modified the maximum attainment dates for all nonattainment areas for the 2008 ozone NAAQS, consistent with the D.C. Circuit's decision. The State Implementation Plan (SIP) Requirements Rule established a maximum deadline for marginal nonattainment areas of three years from the effective date of designation, or July 20, 2015, to attain the 2008 ozone NAAQS. *See* 80 FR at 12268; 40 CFR 51.1103.

In a final rulemaking action published on May 4, 2016, EPA determined that the Pittsburgh Area did not attain the 2008 ozone NAAQS by its July 20, 2015 attainment date, based on ambient air quality monitoring data for the 2012–2014 monitoring period. In that same action, EPA determined that the Pittsburgh Area qualified for a 1-year extension of its attainment date, as provided in section 181(a)(5) of the CAA and interpreted by regulation at 40 CFR 51.1107. The new attainment date for the Pittsburgh Area is July 20, 2016. *See* 81 FR 26697 (May 4, 2016).

II. EPA's Analysis of the Relevant Air Quality Data

Under EPA regulations at 40 CFR part 50, appendix P, the 2008 ozone NAAQS is attained at a monitoring site when the three-year average of the annual fourth highest daily maximum 8-hour average ambient air quality ozone concentration is less than or equal to 0.075 ppm. This three-year average is referred to as the design value. When the design value is less than or equal to 0.075 ppm at each ambient air quality monitoring site within the area, then the area is deemed to be meeting the NAAQS. The rounding convention under 40 CFR part 50, appendix P dictates that concentrations shall be reported in ppm to the third decimal place, with additional digits to the right being truncated. Thus, a computed three-year average ozone concentration of 0.0759 ppm or lower would meet the standard, but 0.0760 ppm or higher is over the standard.

EPA's determination of attainment is based upon data that has been collected and quality-assured in accordance with 40 CFR part 58 and recorded in EPA's Air Quality System (AQS) database. Ambient air quality monitoring data for the three-year period must meet a data completeness requirement. The ambient air quality monitoring data completeness requirement is met when the three-year average of the percent (%) of required monitoring days with valid ambient monitoring data is greater than 90%, and no single year has less than 75% data completeness, as determined according to appendix P of part 50. Tables 1 and 2 show the data completeness and ozone design values, respectively, for each monitor in the Pittsburgh Area for the years 2013–2015.

TABLE 1—2013–2015 PITTSBURGH AREA OZONE MONITOR DATA COMPLETENESS

<table>
<tr><th rowspan="2">County</th><th rowspan="2">Site ID</th><th colspan="3">Percent data completeness</th><th rowspan="2" colspan="2">2013–2015 average percent completeness</th><th rowspan="2">Comment</th></tr>
<tr><th>2013</th><th>2014</th><th>2015</th></tr>
<tr><td>Allegheny</td><td>420030008</td><td>98</td><td>100</td><td>95</td><td colspan="2">98</td><td></td></tr>
<tr><td></td><td>420030010</td><td>100</td><td></td><td></td><td colspan="2">33</td><td>Site shut down in 2013.[a]</td></tr>
<tr><td></td><td>420030067</td><td>99</td><td>99</td><td>100</td><td colspan="2">99</td><td></td></tr>
<tr><td></td><td>420031005</td><td>98</td><td></td><td></td><td>33</td><td rowspan="2">97</td><td>Site shut down in 2013.[b]</td></tr>
<tr><td></td><td>420031008</td><td></td><td>100</td><td>93</td><td>64</td><td>Site started 2014.[b]</td></tr>
<tr><td>Armstrong</td><td>420050001</td><td>95</td><td>100</td><td>100</td><td colspan="2">98</td><td></td></tr>
<tr><td>Beaver</td><td>420070002</td><td>98</td><td>96</td><td>97</td><td colspan="2">97</td><td></td></tr>
</table>

TABLE 1—2013–2015 PITTSBURGH AREA OZONE MONITOR DATA COMPLETENESS—Continued

	420070005	96	95	93	95	
	420070014	89	99	94	94	
Washington	421250005	98	100	97	98	
	421250200	98	98	100	98	
	421255001	100	98	94	97	
	421255200	99	99	....	66	Site shut down in 2015.[a]
Westmoreland	421290006	98	38	....	45	Site shut down in July 2014.[a]
	421290008	97	99	97	98	

Notes:

[a] The monitoring site shutdowns and startups are included in the Pennsylvania Department of the Environment's (PADEP's) July 2014 Annual Network Plan. PADEP submitted the monitoring plan to EPA on June 27, 2014, and EPA approved it on November 21, 2014.

[b] The ozone monitor at monitoring site 420031005 was moved to monitoring site 420031008 in February 2014. The new location is about one quarter of a mile away from the previous location, and is at a similar elevation. The data from these sites will be combined to calculate a valid design value. This monitor move was included in the Allegheny County Health Department's (ACHD's) July 2014 monitoring plan, which ACHD submitted to EPA on July 1, 2014, and which EPA approved on November 21, 2014.

As shown in Table 1, several monitoring sites do not meet the completeness criteria set out in 40 CFR part 50, appendix P. However, the reasons for the completeness issues were either monitor shutdowns or startup, approved into PADEP's and ACHD's monitoring plans. Because three years of complete data is not possible at these monitoring sites, EPA does not look for valid design values at these sites. However, the circumstances are different for monitoring sites 420031005 and 420031008. The ozone monitor was moved from monitoring site 420031005 to monitoring site 420031008. These sites are within 0.25 miles of each other, and are at similar elevations. Therefore, EPA is able to consider the data at both monitoring sites as representing the same area, and can combine the data for these two locations to calculate a valid design value. When data from both locations is considered, the three-year average completeness is 97%.

TABLE 2—2013–2015 PITTSBURGH AREA 2008 OZONE DESIGN VALUES

County	Site ID	4th highest daily maximum			2013–2015 Design value (ppm)
		2013	2014	2015	
Allegheny	420030008	0.070	0.065	0.071	0.068
	420030010	0.075	....	....	....
	420030067	0.066	0.065	0.068	0.066
	420031005	0.076	0.042	....	0.073
	420031008	....	0.071	0.074	....
Armstrong	420050001	0.078	0.068	0.070	0.072
Beaver	420070002	0.072	0.069	0.070	0.070
	420070005	0.072	0.070	0.067	0.069
	420070014	0.066	0.066	0.063	0.065
Washington	421250005	0.064	0.065	0.072	0.067
	421250200	0.067	0.064	0.069	0.066
	421255001	0.071	0.064	0.071	0.068
	421255200	0.063	0.062	0.045	....
Westmoreland	421290006	0.067	0.053	....	....
	421290008	0.070	0.064	0.069	0.067

Note: Only valid design values for monitors meeting the completeness criteria are shown.

Consistent with the requirements contained in 40 CFR part 50, EPA has reviewed the ozone ambient air quality monitoring data for the monitoring period from 2013 through 2015 for the Pittsburgh Area, as recorded in the AQS database. As shown in Table 2, all valid 2013–2015 design values are less than or equal to 0.075 ppm. Therefore, the Pittsburgh Area has attained the 2008 ozone NAAQS, considering 2013–2015 data.

III. Proposed Action

EPA evaluated ozone data from air quality monitors in the Pittsburgh Area in order to determine the area's attainment status under the 2008 ozone NAAQS. State and local agencies responsible for ozone air monitoring networks supplied and quality assured the data. All the monitoring sites with valid data had design values equal to or less than 0.075 ppm based on the 2013–2015 monitoring period. Considering that review, EPA has concluded that this area attained the 2008 ozone NAAQS based on complete, quality assured and certified data for the 2013–2015 ozone seasons. Thus, EPA proposes to determine, in accordance with its statutory obligations under section 181(b)(2)(A) of the CAA and the provisions of the SIP Requirements Rule (40 CFR 51.1103), that the Pittsburgh Area attained the 2008 ozone NAAQS by the applicable attainment date of July 20, 2016.

This proposed determination of attainment does not constitute a redesignation to attainment. Redesignations require states to meet a number of additional criteria, including EPA approval of a state plan to maintain the air quality standard for 10 years after redesignation. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

This rulemaking action proposes to make a determination of attainment on the 2008 ozone NAAQS based on air quality and, if finalized, would not impose additional requirements. For that reason, this proposed determination of attainment:

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule, proposing to determine that the Pittsburgh Area attained the 2008 ozone NAAQS by its July 20, 2016 attainment date, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because this proposed determination of attainment does not apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Ozone, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: August 12, 2016.

Shawn M. Garvin,

Regional Administrator, Region III.

[FR Doc. 2016–20313 Filed 8–24–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2013–0145; FRL–9951–30–Region 8]

Approval and Promulgation of Air Quality Implementation Plans; North Dakota; Revisions to Air Pollution Control Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing approval of State Implementation Plan (SIP) revisions submitted by the State of North Dakota on January 28, 2013 and April 22, 2014. The revisions are to Article 33–15 "Air Pollution Control" rules of the North Dakota Administrative Code. The revisions include amendments to update the Prevention of Significant Deterioration (PSD) rules and the definition of "volatile organic compounds"; to add particulate matter less than 2.5 microns in diameter ($PM_{2.5}$) methods of measurement; to modify the $PM_{2.5}$ state ambient air quality standard, permissible open burning rule, and permit fee processes; and, to remove permitting fees for sources that operate an air monitoring site. The revisions also make clarifying changes. This action is being taken under section 110 of the Clean Air Act (CAA).

DATES: Written comments must be received on or before September 26, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R08–OAR–2013–0145 at *http://www.regulations.gov*. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.,) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129. The EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Jaslyn Dobrahner, Air Program, U.S. Environmental Protection Agency (EPA), Region 8, Mail Code 8P–AR, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6252, *dobrahner.jaslyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

What should I consider as I prepare my comments for EPA?

1. *Submitting Confidential Business Information (CBI).* Do not submit CBI to the EPA through *http://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD–ROM that you mail to the EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register**, date, and page number);

- Follow directions and organize your comments;
- Explain why you agree or disagree;
- Suggest alternatives and substitute language for your requested changes;
- Describe any assumptions and provide any technical information and/or data that you used;
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced;
- Provide specific examples to illustrate your concerns, and suggest alternatives;
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats; and
- Make sure to submit your comments by the comment period deadline identified.

II. Background

A. On January 28, 2013, the State of North Dakota submitted a SIP revision containing amendments to Article 33–15 Air Pollution Control rules. The amendments: Update the PSD rules; add $PM_{2.5}$ methods of measurement; revise permit fee processing; remove permitting fees for sources that operate an air monitoring site; and make clarifying changes. The North Dakota State Health Council adopted the amendments on August 14, 2012 (effective January 1, 2013).

B. On April 22, 2014, the State of North Dakota submitted a SIP revision containing amendments to Article 33–15 Air Pollution Control rules. The amendments: Update the PSD rules and the definition of "volatile organic compounds"; revise the $PM_{2.5}$ state ambient air quality standard and permissible open burning rule; and clarify excess emissions reporting requirements. The North Dakota State Health Council adopted the amendments on February 11, 2014 (effective April 1, 2014).

III. The EPA's Review of the State of North Dakota's January 28, 2013 and April 22, 2014 Submittals

We evaluated North Dakota's January 28, 2013 and April 22, 2014 submittals regarding revisions to the State's Air Pollution Control rules. We propose to approve some of the revisions and not act on other revisions.

A. January 28, 2013 SIP Submittal

The State's January 28, 2013 SIP submittal includes the following types of amendments to the State's air quality rules: Revisions to update State-specific additions to the incorporation by reference of the PSD rules; revisions to add $PM_{2.5}$ methods of measurement; revisions to remove permitting fees for sources that operate an air monitoring site; and a revision to streamline the administrative fee process. The revisions also make clarifying changes.

The January 2013 submittal adds a sentence to 33–15–01–13.3, "[t]he provisions of this subsection do not apply to sources that are subject to monitoring requirements in chapter 33–15–21," to clarify that the alternative monitoring requirements in this rule do not apply to sources that are required to comply with the acid rain rules and exempts sources subject to acid rain requirements in chapter 33–15–21, *Acid Rain Program,* from the continuous emission monitoring system (CEMS) failures requirements found in 33–15–01–13.3 of the *General Provisions* chapter. Instead, 33–15–21–09.1 requires that CEMS monitoring, recordkeeping, and reporting requirements found in 40 CFR part 75 and its appendices apply to sources subject to acid rain requirements. This revision is for clarification purposes, and we propose to approve it. Likewise, we propose to approve the State's revisions to 33–15–05–04.3 that indicate $PM_{2.5}$ measurements must be made in accordance with 40 CFR 51, Appendix M, *Recommended Test Methods for State Implementation Plans* and clarifies the definition of PM_{10} determinations under the same method.

The State revised section 33–15–14–02.13.c(4) by deleting "or are subject to a standard under chapter 33–15–22," to clarify that sources subject to the national emission standards for hazardous air pollutants (40 CFR part 63) in chapter 33–15–22, *Emissions Standards for Hazardous Air Pollutants for Source Categories,* do not need a permit to construct if they meet the exemption requirements found in 33–15–14–02.13. The State requested this revision to clarify that sources at minor facilities do not require a permit. Since the North Dakota SIP already exempts engine sources whose emissions are below certain thresholds (see 33–15–14–02.13(c)(1), (2), (3)) and also requires major hazardous air pollutant sources subject to maximum achievable control technology (MACT) to obtain a permit (see 33–15–22), we agree that this revision is for clarification purposes and propose to approve it.

The State makes a number of revisions in their January 28, 2013 submittal to their PSD rules found in chapter 33–15–15; some of the revisions we approved in prior actions, while other revisions were superseded by subsequent SIP submittals. First, the State updates the incorporation by reference date in 33–15–15–01.2 for 40 CFR 52.21, paragraphs (a)(2) through (e), (h) through (r), (v), (w), (aa) and (bb) to as they exist on January 1, 2012. We acted on the approval of incorporating 40 CFR 52.21(b)(14)(i) through (iii); (b)(15)(i) and (ii); and paragraph (c) pertaining to major and minor source baseline dates and ambient air increments in our July 30, 2013 final rule (78 FR 45866) approving the State's demonstration that the North Dakota SIP meets the infrastructure requirements of the CAA for the National Ambient Air Quality Standards (NAAQS) promulgated for $PM_{2.5}$ on July 18, 1997 and on October 17, 2006. In doing so, paragraphs (b)(14)(i) through (iii); (b)(15)(i) and (ii); and paragraph (c) were added to 40 CFR 52.1829 as paragraphs (c) and (d). We are proposing to not act on incorporating the remainder of 40 CFR 52.21 as they exist on January 1, 2012, because this revision is superseded by the revision in the State's April 22, 2014 submittal to incorporate the same portions of 40 CFR 52.21 as they existed on July 1, 2013.

There are additional revisions in the State's January 28, 2013 PSD rules in 33–15–15–01.2. that we propose to approve. First, the State relocates 40 CFR 52.21(b)(50)(i)(c) and (b)(50)(i)(d) to correct numerical order. Second, the State revises 40 CFR 52.21(d) consistent with the federal rule at the same citation by changing "[n]o concentration of a contaminant shall exceed the ambient air quality standards in chapter 33–15–02 for these areas subject to regulation under this article and the national ambient air quality standards in all other areas of the United States" to "[n]o concentration of a contaminant shall exceed: (1) The concentration permitted under the national primary and secondary ambient air quality standards. (2) The concentration permitted by the ambient air quality standards in chapter 33–15–02." Third, the State revises 40 CFR 52.21(k)(1) consistent with the federal regulations at 40 CFR 52.21(k)(1)(i) by changing "[a]ny ambient air quality standard in chapter 33–15–02 for those areas subject to regulation under this article and the national ambient air quality standards in all other areas of the United States; or" to "[a]ny national ambient air quality standard or any standard in chapter 33–15–02." The State recognizes their current regulations inadvertently do not include (i) after 40 CFR 52.21(k)(1) and will revise the language to read 40 CFR 52.21(k)(1)(i) in a future submittal.[1] Fourth, the State also revised 40 CFR 52.21(v)(2)(iv)(a) consistent with the federal rule at the same citation by adding "national ambient air quality standard or any" and deleting "regulation under this article and the national ambient air quality standards in all other areas of the United States." We propose to approve all of these changes.

We also propose to approve in the January 28, 2013 submittal revisions to chapter 33–15–23, *Fees,* allowing billing statements to be sent to applicants before final determinations have been made (33–15–23–02.2.c) and removing the permit fee for sources that operate an air monitoring site (33–15–23–03.1). CAA section 110(a)(2)(E) requires that a state implementation plan provide assurances that the state will have, among other items, adequate funding to carry out the implementation plan. Sending billing statements earlier than currently required under the SIP impacts the timing of when the fees are billed and collected. Therefore, it is appropriate to propose to approve because the change impacts the timing. The deletion of the criteria that describe this category is approvable because under 33–15–23–03.2 North Dakota will continue to charge fees to sources based on actual costs incurred by the State for the following: (1) Observation of source or performance specification testing; and (2) audits of source operated ambient air monitoring networks.

In this submittal, the State also made clarifying revisions to three other SIP provisions. First, the State modified the abbreviation of PM_{10} (33–15–01–05) by adding the phrase "less than or equal" and deleting the less than or equal to symbol. Second, the State moved and modified language related to agricultural practices and fugitive emissions from chapter 33–15–17 *Restriction of Fugitive Emission* to chapter 33–15–03 *Restriction of Emissions of Visible Air Contaminants* (the State deleted from 33–15–17–02.6 "[a]gricultural activities related to the normal operations of a farm shall be exempt from the requirements of this section. However, agricultural practices such as tilling of land, application of fertilizers, and the harvesting of crops shall be managed in such a manner as to minimize dust from becoming airborne," and then added the following sentence to 33–15–03–04.5 "[h]owever, agricultural practices such as tilling of land, application of fertilizers, harvesting of crops, and other activities shall be managed in such a manner as to minimize dust from becoming airborne"). In doing this the State modified the existing SIP by removing the exemption and requirement related to agricultural activities and fugitive dust under chapter 33–15–17, *Restriction of Fugitive Emissions,* and adding the same requirement related to agricultural activities and fugitive dust to chapter 33–15–03, *Restriction of Emission of Visible Air Contaminants.* We view these changes as non-substantive, SIP-strengthening, and clarifying because it removes an exemption and moves a requirement to a related area in the SIP. Third, the State inserted a reference to the exceptions found in 33–15–03–04 to the restrictions on the emission of visible air contaminants in chapter 33–15–03 *Restriction of Emissions of Visible Air Contaminants* into 33–15–17–02.4, which has the effect of referring the reader to exceptions already located within another chapter of the State's rules, which we characterize as a clarifying revision. We propose to approve all of these as clarifying, SIP-strengthening, and non-substantive revisions.

Finally, we are not acting on the revision to 33–15–01–04 as this revision to the incorporation by reference date is superseded by a revision in the April 2014 submittal. We are also not acting on revisions to 33–15–03–04.4 and 33–15–05–01.2a(1) to remove improper exemptions from emissions limitations as we acted on these previously (79 FR 63045). We will act on revisions to 33–15–14–02.1, 33–15–14–02.5.a and 33–15–15–01-.2 in a future rulemaking and thus are not acting on these revisions at this time.

B. April 22, 2014 SIP Submittal

The State's April 22, 2014 SIP submittal includes the following types of amendments to the State's air quality rules: Revisions to update the dates of incorporation by reference of the (1) PSD rules, and (2) the definition of "volatile organic compounds"; revisions to lower the $PM_{2.5}$ State ambient air quality standard; revisions to clarify the permissible open burning rule; a revision that clarifies that the required excess emissions reporting requirements are for sources that operate continuous emission monitors; and a revision that removes a category of fees.

The CAA requires the regulation of volatile organic compounds (VOCs) for various purposes. For example, tropospheric ozone, commonly known as smog, is formed when VOC and nitrogen oxides (NO_X) react in the atmosphere in the presence of sunlight. Thus, because of the harmful health effects of ozone, the EPA and state governments limit the amount of VOC—organic compounds of carbon—that can be released into the atmosphere. Section 302(s) of the CAA specifies that the EPA has the authority to define the meaning of "VOC," and hence what compounds shall be treated as VOC for regulatory purposes. The EPA defines VOCs at 40 CFR 51.100(s) and VOC exclusions, determined to have negligible photochemical reactivity, at 51.100(s)(1). In its January 2013 submittal, the State updates 33–15–01–04, *Definitions,* to include the incorporation by reference of 40 CFR 51.100(s) as it exists on January 1, 2012. Subsequently, in its April 2014 submittal, the State updates 33–15–01–04, *Definitions,* again to include the incorporation by reference of 40 CFR 51.100(s) as it exists on July 1, 2013. The April 2014 submittal supersedes the January 2013 submittal, thus we are proposing to approve the April 2014 revision because it incorporates by reference the EPA's rule provisions.

The CAA also requires the EPA to set National Ambient Air Quality Standards (40 CFR part 50) for pollutants considered harmful to public health and the environment and identifies two types of national ambient air quality standards: *Primary standards* provide public health protection, including protecting the health of "sensitive" populations such as asthmatics, children, and the elderly; and *Secondary standards* provide public welfare protection, including protection against decreased visibility and damage to animals, crops, vegetation, and buildings. In 2012 (78 FR 3086), the EPA revised the primary (health-based) annual $PM_{2.5}$ standard by lowering the level from 15 micrograms per cubic meter ($\mu g/m^3$) to 12.0 $\mu g/m^3$ so as to provide increased protection against health effects associated with long- and short-term exposures (including premature mortality, increased hospital admissions and emergency department visits, and development of chronic respiratory disease). Accordingly, the State's April 2014 submittal revises the $PM_{2.5}$ primary standard in Table 1. Ambient Air Quality Standards of chapter 33–15–02 from 15.0 $\mu g/m^3$ to match the federal standard of 12.0 $\mu g/m^3$. We propose to approve this revision because it is consistent with the federal standard.

In addition, we propose to approve revisions in the April 2014 submittal that revise 33–15–04–02.2.a to require that any type of permissible burning listed in 33–15–04–02.1 will not create "air pollution" as defined by the State in 33–15–04 (33–15–04–02.2.a); and to delete the existing SIP requirement in 33–15–04–02.2.a (73 FR 30308), that prohibited permissible burning listed in 33–15–04–02.1 from creating a public nuisance (''No public nuisance is or will be created''). We propose to approve these revisions because they strengthen the SIP by prohibiting open burning that creates air pollution where ''one or more air contaminants in such quantities and duration as is or may be injurious to human health, welfare, or property or animal or plant life, or which unreasonably interferes with the enjoyment of life or property.''

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[1] Refer to docket #EPA–R08–OAR–2013–0145 for documentation.

We also propose to approve the clarification to the applicability of excess emissions reporting and recordkeeping requirements for continuous emission monitoring requirements (33–15–06–05.1). We propose to approve this revision because it clarifies the existing SIP provision (58 FR 54041) and explains that the emission monitoring requirements referenced in 33–15–06–05.1 are those performed for continuous emission monitoring (adding the phrase ''in accordance with section 33–15–06–04'').

In the April 2014 submittal, the State also revised the incorporation by reference date of 40 CFR 52.21 into the state regulations to July 1, 2013 (33–15–15–01.2). As previously discussed in III.A., we approved the incorporation of 40 CFR 52.21(b)(14)(i) through (iii); (b)(15)(i) and (ii); and paragraph (c) pertaining to major and minor source baseline dates and ambient air increments in our July 30, 2013 final rule (78 FR 45866) by adding paragraphs (c) and (d) to 40 CFR 52.1829. We propose to approve the State's revision of the incorporation by reference date to July 1, 2013 because it references our regulations, and in doing so, propose to delete paragraphs (c) and (d) in 40 CFR 52.1829 as they would no longer be needed and would be duplicative if retained. The State also added the reference to ''title'' before the federal regulation citation in this section (first paragraph), and as this is for clarification purposes, we propose to approve this addition.

We are proposing to approve the State's deletion of the criteria for the ''Monitor'' category (33–15–23–03.01) from the SIP. These criteria explain the ''Monitor'' fee is a charge that applies to minor sources that is ''in addition to the annual fee for any source operating a continuous emission monitor system (CEMS) or an ambient monitoring site.'' The State's January 2013 SIP submittal indicates that this fee is no longer being charged.[2] Thus, removal of the ''Monitor'' category corresponds to the State's revision in their January 2013 submittal (removing the annual fee for minor sources that operate an emission monitor or ambient air quality monitoring site), which we propose to approve in section III.A.

Finally, we are not acting on the State's revision to 33–15–03–05 and will instead take action on this revision in a future rulemaking.

IV. What action is the EPA taking?

For the reasons expressed in III.A. and III.B., the EPA is proposing to approve the following revisions, shown in Table 1, to the State's Air Pollution Control rules. We are also proposing to not act on several other revisions, shown in Table 2, for the reasons discussed in III.A. and III.B. and summarized below.

TABLE 1—LIST OF NORTH DAKOTA REVISIONS THAT THE EPA IS PROPOSING TO APPROVE

Revised sections in January 28, 2013 and April 22, 2014 submissions proposed for approval
January 28, 2013 submittal: 33–15–01–05; 33–15–01–13.3; 33–15–03–04.5; 33–15–05–04.3; 33–15–14–02.13.c(4); 33–15–15–01.2 †; 33–15–17–02.4; 33–15–17–02.6; 33–15–23–02.2.c; 33–15–23–03.1.
April 22, 2014 submittal: 33–15–01–04; 33–15–02, Table 1.; 33–15–04–02.2.a; 33–15–06–05.1; 33–15–15–01.2; 33–15–23–03.

† Except for the incorporation by reference date in the first paragraph and the revision associated with 40 CFR 52.21(l)(1).

TABLE 2—LIST OF NORTH DAKOTA REVISIONS THAT THE EPA IS PROPOSING TO TAKE NO ACTION ON

Revised section	Revision superseded by April 22, 2014 submittal	Revision acted on in 79 FR 63045	Revision will be acted on in a future submittal
Revised Sections in January 28, 2013 Submission Proposed for No Action			
33–15–01–04	x		
33–15–03–04.4		x	
33–15–05–01.2a(1)		x	
33–15–14–02.1			x
33–15–14–02.5.a			x
33–15–15–01.2 ‡	x		
33–15–15–01.2 §			x
Revised Section in April 22, 2014 Submission Proposed for No Action			
33–15–03–05			x

‡ Only the revision to the incorporation by reference date in the first paragraph.
§ Only the revision associated with 40 CFR 52.21(l)(1).

V. Incorporation by Reference

In this rule, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference North Dakota Administrative Code as described in section IV. of this preamble. The EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and/or at the EPA Region 8 Office (please contact the person identified in the "For Further Information Contact" section of this preamble for more information).

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[2] April 2014 State SIP Submittal, PDF page 14.

VI. Statutory and Executive Orders Review

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations (42 U.S.C. 7410(k), 40 CFR 52.02(a)). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves some state law as meeting federal requirements; this proposed action does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and,
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian Country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Greenhouse gases, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: August 11, 2016.

Debra H. Thomas,

Acting Regional Administrator, Region 8.

[FR Doc. 2016–20320 Filed 8–24–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[EPA–R02–OAR–2016–0088; FRL 9951–23–Region 2]

Approval and Promulgation of State Plans for Designated Facilities and Pollutants; Virgin Islands; Sewage Sludge Incinerators

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to approve the Clean Air Act (CAA) section 111(d)/129 negative declaration for the Government of the United States Virgin Islands, for existing sewage sludge incinerator (SSI) units. This negative declaration certifies that existing SSI units subject to sections 111(d) and 129 of the CAA do not exist within the jurisdiction of the United States Virgin Islands. The EPA is accepting the negative declaration in accordance with the requirements of the CAA.

DATES: Comments must be received on or before September 26, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R02–OAR–2016–0088 to *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Edward J. Linky, Environmental Protection Agency, Air Programs Branch, 290 Broadway, New York, New York 1007–1866 at 212–637–3764 or by email at *Linky.Edward@epa.gov.*

SUPPLEMENTARY INFORMATION: In the final rules section of this **Federal Register**, the EPA is approving the Virgin Islands' negative declaration submitted December 1, 2015 as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision amendment and anticipates no adverse comments to this action.

A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action, no further activity is contemplated in relation to this action. If the EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed action. The EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. For additional information, see the direct final rule which is located in the rules section of this **Federal Register**.

List of Subjects in 40 CFR Part 62

Environmental protection, Air pollution control, Administrative practice and procedure, Intergovernmental relations, Reporting and recordkeeping requirements, Sewage sludge incinerators.

Dated: August 8, 2016.

Judith A. Enck,

Regional Administrator, Region 2.

[FR Doc. 2016–20304 Filed 8–24–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 160405311–6664–01]

RIN 0648–BF95

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Rehabilitation of the Jetty System at the Mouth of the Columbia River: Jetty A, North Jetty, and South Jetty, in Washington and Oregon

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS has received a request from the U.S. Army Corps of Engineers, Portland District (Corps) for authorization to take marine mammals incidental to the rehabilitation of Jetty System at the mouth of the Columbia River (MCR): North Jetty, South Jetty, and Jetty A, in Washington and Oregon between May 1, 2017 and April 30, 2022. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue regulations and subsequent Letters of Authorization (LOA) to the Corps to incidentally harass marine mammals.

DATES: Comments and information must be received no later than September 26, 2016.

ADDRESSES: You may submit comments on this document, identified by NMFS–2014–0144, by either of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to: *www.regulations.gov,* enter NOAA–NMFS–2014–0144 in the "Search" box, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

Comments regarding any aspect of the collection of information requirement contained in this proposed rule should be sent to NMFS via one of the means stated here and to the Office of Information and Regulatory Affairs, NEOB–10202, Office of Management and Budget (OMB), Attn: Desk Office, Washington, DC 20503, *OIRA@omb.eop.gov.*

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous).

An electronic copy of the application, containing a list of references used in this document, and the Environmental Assessment (EA) may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* To help NMFS process and review comments more efficiently, please use only one method to submit comments.

FOR FURTHER INFORMATION CONTACT: Rob Pauline, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as: "any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment]."

Summary of Request

On February 13, 2015, NMFS received an application from the Corps for the taking of marine mammals incidental to the rehabilitation of the Jetty System at the MCR in Washington and Oregon. On June 9, 2015, NMFS received a revised application. NMFS determined that the application was adequate and complete on June 12, 2015. NMFS issued an incidental harassment authorization (IHA) to the Corps on August 31, 2015 (80 FR 53777, September 8, 2015) to cover pile installation at Jetty A which is valid from May 1, 2016 through April 30, 2017. The Corps proposes to conduct additional work under a Letter of Authorization (LOA) that may incidentally harass marine mammals. A notice of receipt was published in the **Federal Register** on October 26, 2015 (80 FR 65214). Activities would include pile repairs and removal actions at Jetty A, pile installation at North Jetty, and pile installation and surveys at South Jetty. A revised application including an updated marine mammal monitoring plan was submitted by the Corps on January 15, 2016 and deemed acceptable on January 30, 2016.

Description of the Specified Activity

Overview

The Corps is seeking a LOA for continuation of work begun on Jetty A under an IHA issued by NMFS that expires on April 30, 2017. Remaining work at Jetty A that may need to be completed under the LOA would include pile maintenance and pile removal of a barge offloading facility at that jetty. The following work on the North and South Jetties would be covered under the proposed LOA. The scheduled repair and head stabilization of the North Jetty would require pile installation, maintenance and removal for construction of a single barge offloading facility. The interim repair and head determination of the South

Jetty would require pile installation and maintenance and removal of two offloading facilities, one near the tip of the South Jetty and another at a sandy plain southwest of the Columbia River and east of the South Jetty known as the Clatsop Spit.

Dates and Duration

The current IHA, for which take has been authorized, is valid from May 1, 2016, through April 30, 2017. The LOA would be valid from May 1, 2017, through April 30, 2022. The work season generally extends from April through October, with extensions, contractions, and additional work windows outside of the summer season varying by weather patterns. To avoid the presence of Southern Resident killer whales, the Corps will prohibit pile installation or removal for offloading facilities from October 1 until May1 because that is the killer whales' primary feeding season when they may be present at the MCR plume. Installation and removal would occur from May 1 to September 30 each year.

Specific Geographic Region

This activity will take place at the three MCR jetties in Pacific County, Washington, and Clatsop County, Oregon. These are Jetty A, North Jetty and South Jetty. Work will also be conducted near the Clatsop Spit off of the South Jetty. See Figure 1 in the application for a map of the MCR Jetty system and surrounding areas.

Detailed Description of Activities

There are a number of steps involved in the planned multi-year effort to rehabilitate the MCR Jetty System. This notice will focus only on those components of the project under the MMPA. Additional detailed information about the project in its entirety is contained in the application which may be found at: *http://www.nmfs.noaa.gov/pr/permits/incidental/construction.htm.*

Construction of a single offloading facility at Jetty A, a single facility at the North Jetty and two additional facilities at the South Jetty will be necessary to transport materials to these specific project locations. Jetty A pile installation is covered under the existing IHA. The proposed LOA will likely cover remaining pile installation, pile maintenance and pile removal at Jetty A depending on how much work is accomplished under the current IHA. The proposed LOA would cover pile installation and removal of one facility at North Jetty and two at South Jetty, including the Clatsop Spit location. In addition, all work related to pedestrian surveys of the South Jetty that could result in visual disturbance to pinnipeds will be covered under the proposed LOA.

The scheduled program of repair and rehabilitation priorities are described in detail in Section 1 of the Corps' LOA application. The proposed sequence and timing for work under the LOA at the three MCR jetties includes:

1. The Jetty A scheduled repairs and head stabilization task will be covered under the current IHA. This would include pile installation related to construction of an offloading facility as well as construction and stone placement. There will be at least one season of in-water work but two seasons are likely to be required to complete these activities. The second season of pile maintenance and removal would occur in 2017 and be covered under the proposed LOA.
2. The North Jetty scheduled repair and head stabilization task would occur under the proposed LOA and include pile installation and removal at an offloading facility. Construction and placement would occur from 2017 through 2019 as this task will require three placement seasons.
3. The South Jetty interim repair and head determination task would occur under the proposed LOA and would include pile installation and removal at two facilities with one being on the trunk near the head and the other at Clatsop Spit. This task would require four placement seasons running from 2018 through 2021.

Installation and removal of piles with a vibratory hammer would introduce sound waves into the MCR area intermittently for up to 7 years (depending on funding streams and construction sequences). In terms of actual on-the-ground work it is possible, but unlikely, that driving could occur at multiple facilities on the same day. For the purposes of this LOA, NMFS will be assuming that driving will occur only at a single facility on any given day.

Construction of all four offloading facilities combined will require up to 96 wood or steel piles and up to 373 sections of Z-piles, H-piles, and sheet pile to retain rock fill. A vibratory hammer will be used for pile installation due to the soft sediments (sand) in the project area and only untreated wood will be used, where applicable. No impact driving will be necessary under this LOA. The piles will be located within 200 ft (60.96 m) of each jetty structure. The presence of relic stone may require locating the piling further from the jetties so that use of this method is not precluded by the existing stone. The dolphins, Z- and H-piles would be composed of either untreated timber or steel piles installed to a depth of approximately 15 to 25 ft (4.5—7.6 m) below grade in order to withstand the needs of offloading barges and heavy construction equipment. Because vibratory hammers will be used in areas with velocities greater than 1.6 ft (0.49 m) per second, the need for hydroacoustic attenuation is not an anticipated issue.

Pile installation is assumed to occur for about 10 hours a day, with a total of approximately 15 piles installed per day. Each offloading facility would have about 25 percent of the total piles mentioned. As noted above, up to 96 piles could be installed, and up to 373 sections of sheet pile to retain rock fill. This is a total of 469 initial installation and 469 removal events, over the span of about 67 days. In order to round the math, NMFS has assumed 68 days, so that each of the four offloading facilities would take about 17 days total for installation and removal. The current IHA covers 17 days of work at Jetty A, which leaves 51 days of work for the three remaining offloading facilities at the North and South Jetties. However, a second season of work at the Jetty A facility is likely. Therefore, NMFS will assume that only ten days of Jetty A-related work will be completed under the existing IHA, resulting in seven days that will need to be covered under the proposed LOA. Additionally, pedestrian surveys on South Jetty outside of the construction seasons are expected to take six additional days. A total of 64 days of work will be required, consisting of 51 days associated with activities at the North and South Jetties, seven days of remaining work at Jetty A and six days of pedestrian surveys at South Jetty.

Piles would be a maximum diameter of 24 inches and would only be installed by vibratory driving method. The possibility also exists that smaller diameter piles may be used but for this analysis it is assumed that 24 inch piles will be driven.

Description of Marine Mammals in the Area of the Specified Activity

Marine mammals known to occur in the Pacific Ocean offshore at the MCR include whales, orcas, dolphins, porpoises, sea lions, and harbor seals. Most cetacean species observed by Green and others (1992) occurred in Pacific slope or offshore waters (600 to 6,000 feet in depth). Harbor porpoises (*Phocoena phocoena)* and gray whales (*Eschrichtius robustus)* were prevalent in shelf waters less than 600 ft (182 m) in depth. Killer whales *(Orcinus orca)* are known to feed on Chinook salmon at the MCR, and humpback whales

(*Megaptera novaeangliae*) may transit through the area offshore of the jetties. The marine mammal species potentially present in the activity area are shown in Table 1.

Pinniped species that occur in the vicinity of the jetties include Pacific harbor seals (*Phoca vitulina richardsi*), California sea lions (*Zalophus californianus*), and Steller sea lions (*Eumetopias jubatus*). A haulout used by all of these species is located on the open ocean side of the South Jetty.

In the species accounts provided here, we offer a brief introduction to the species and relevant stock. We also provide available information regarding population trends and threats and describe any information regarding local occurrence.

TABLE 1—MARINE MAMMAL SPECIES POTENTIALLY PRESENT IN THE PROJECT AREA

Species	Stock(s) abundance estimate [1]	ESA* Status	MMPA** Status	Frequency of occurrence [3]
Killer Whale (*Orcinus orca*) *Eastern N. Pacific, Southern Resident Stock.*	82	Endangered	Depleted and Strategic	Infrequent/ Rare.
Killer Whale (*Orcinus orca*) *Eastern N. Pacific, West Coast Transient Stock.*	243		Non-depleted	Rare.
Gray Whale (*Eschrichtius robustus*) *Eastern North Pacific Stock, (Pacific Coast Feed Group).*	20,990 (197)	Delisted/ Recovered (1994).	Non-depleted	Rare.
Humpback Whale (*Megaptera novaeangliae*) *California/Oregon/Washington Stock.*	1918	Endangered	Depleted and Strategic	Rare.
Harbor Porpoise (*Phocoena phocoena*) *Northern Oregon/Washington Coast Stock.*	21,487		Non-depleted	Likely.
Steller Sea Lion (*Eumetopias jubatus*) *Eastern U.S. Stock/DPS***.*	60,131–74,448	Delisted/ Recovered (2013).	Depleted and Strategic [2].	Likely.
California Sea Lion (*Zalophus californianus*) *U.S. Stock.*	296,750		Non-depleted	Likely.
Harbor Seal (*Phoca vitulina richardii*) *Oregon and Washington Stock.*	[4] 24,732		Non-depleted	Seasonal.

[1] NOAA/NMFS 2015 marine mammal stock assessment reports at *http://www.nmfs.noaa.gov/pr/sars/species.htm.*

[2] May be updated based on the recent delisting status.

[3] Frequency defined here in the range of:

- Rare—Few confirmed sightings, or the distribution of the species is near enough to the area that the species could occur there.
- Infrequent—Confirmed, but irregular sightings.
- Likely—Confirmed and regular sightings of the species in the area year-round.
- Seasonal—Confirmed and regular sightings of the species in the area on a seasonal basis.

[4] Data is 8 years old. No current abundance estimates exist.

* ESA = Endangered Species Act.

** MMPA = Marine Mammal Protection Act.

*** DPS = Distinct population segment.

Cetaceans

Killer Whale

During construction of the project, it is possible that two killer whale stocks, the Eastern North Pacific Southern Resident and Eastern North Pacific West Coast transient stocks could be in the nearshore vicinity of the MCR. However, the Corps is limiting the installation work window to on or after May 1 in order to avoid exposure of Southern Resident killer whales (*Orcinus orca*) and will avoid installation or removal after September 30. As such, number of either West Coast transient or Southern Resident killer whales present in the project area will be decreased because the selected work window is not their primary feeding season.

Since the first complete census of this stock in 1974, when 71 animals were identified, the number of Southern Resident killer whales has fluctuated annually. Between 1974 and 1993 the Southern Resident stock increased approximately 35 percent, from 71 to 96 individuals (Ford *et al.*, 1994), representing a net annual growth rate of 1.8 percent during those years. Following the peak census count of 99 animals in 1995, the population size has fluctuated and currently stands at 82 animals as of the 2013 census (Carretta *et al.*, 2014).

The Southern Resident killer whale population consists of three pods, designated J, K, and L pods, that reside from late spring to fall in the inland waterways of Washington State and British Columbia (NMFS 2008a). During winter, pods have moved into Pacific coastal waters and are known to travel as far south as central California. Winter and early spring movements and distribution are largely unknown for the population. Sightings of members of K and L pods in Oregon (L pod at Depoe Bay in April 1999 and Yaquina Bay in March 2000, unidentified Southern Residents at Depoe Bay in April 2000, and members of K and L pods off of the Columbia River) and in California (17 members of L pod and four members of K pod at Monterey Bay in 2000; L pod members at Monterey Bay in March 2003; L pod members near the Farallon Islands in February 2005 and again off Pt. Reyes in January 2006) have considerably extended the southern limit of their known range (NMFS 2008a). Sightings of Southern Resident killer whales off the coast of Washington, Oregon, and California indicate that they are utilizing resources in the California Current ecosystem in contrast to other North Pacific resident pods that exclusively use resources in the Alaskan gyre system (NMFS 2008a).

During the 2011 Section 7 Endangered Species Act (ESA) consultation for Southern Resident killer whales, NMFS indicated these whales are known to feed on migrating Chinook salmon in the Columbia River plume during the peak salmon runs in March through April. Anecdotal evidence indicates that killer whales were historically regular visitors in the vicinity of the estuary but have been less common in current times (Wilson 2015). There is low likelihood of them being in close proximity to any of the pile installation locations because it is not their peak feeding season, and there would be minimal overlap of their presence during the peak summer construction season. To further avoid any overlap with Southern Resident killer whales' use during pile installation, the Corps would limit the pile installation window to start on or after May 1 and end on September 30 of each year to avoid peak adult salmon runs. Recent information, however, indicates that Southern Resident killer whales may be present in the area after May 1. Because it may prove difficult to differentiate Southern Resident from transient killer whales, the Corps has agreed to shut down operations any time killer whales are observed in the Level B harassment zone between May 1 and July 1. It is assumed that all killer whales observed after July 1 are transients and any takes will be recorded as such. Southern Resident killer whales were listed as endangered under the ESA in 2005, and, consequently, the stock is automatically considered as a "strategic" stock under the MMPA. This stock was considered "depleted" under the MMPA prior to its 2005 listing under the ESA.

The West Coast transient stock ranges from Southeast Alaska to California. Preliminary analysis of photographic data resulted in the following minimum counts for transient killer whales belonging to the West Coast transient stock (NOAA 2013b). From 1975 to 2012, 521 individual transient killer whales have been identified. Of these, 217 are considered part of the poorly known "outer coast" subpopulation and 304 belong to the well-known "inner coast" population. However, of the 304, the number of whales currently alive is not certain. A recent mark-recapture estimate that does not include the outer coast subpopulation or whales from California for the west coast transient population resulted in an estimate of 243 in 2006. This estimate applies to the population of West Coast transient whales that occur in the inside waters of southeastern Alaska, British Columbia, and northern Washington. Given that the California transient numbers have not been updated since the publication of the catalogue in 1997, the total number of transient killer whales reported above should be considered as a minimum count for the West Coast transient stock (NOAA 2014a).

For this project, it is possible only the inner-coast species would be considered for potential exposure to acoustic effects. However, they are even less likely to be in the project area than Southern Resident killer whales, especially outside of the peak salmon runs. The Corps is avoiding pile installation work during potential peak feeding timeframes in order to further reduce the potential for acoustic exposure. It is possible, however, that West Coast transients come in to feed on the pinniped population hauled out on the South Jetty. The West Coast transient stock of killer whales is not designated as "depleted" under the MMPA nor are they listed as "threatened" or "endangered" under the ESA. Furthermore, this stock is not classified as a strategic stock under the MMPA.

Gray Whale

During summer and fall, most gray whales in the Eastern North Pacific stock feed in the Chukchi, Beaufort and Northwestern Bering Seas. An exception is the relatively small number of whales (approximately 200) that summer and feed along the Pacific coast between Kodiak Island, Alaska and northern California (Carretta *et al.*, 2014), also known as the Pacific Coast Feeding Group. The minimum population estimate for the Eastern North Pacific stock using the 2006/2007 abundance estimate of 19,126 and its associated coefficient of variation (CV) of 0.071 is 18,017 animals. In probability theory and statistics, the CV, also known as relative standard deviation (RSD), is a standardized measure of dispersion of a probability distribution or frequency distribution. The minimum population estimate for Pacific Coast Feeding Group gray whales is calculated as the lower 20th percentile of the log-normal distribution of the 2010 mark-recapture estimate, or 173 animals (Carretta *et al.*, 2014). If gray whales were in the vicinity of MCR, the Pacific Coast Feeding Group would be the most likely visitor. Anecdotal evidence indicates they have been seen at MCR but are not a common visitor as they mostly remain in the vicinity of the offshore shelf-break (Griffith 2015). In 1994, the Eastern North Pacific stock of gray whales was removed from the Endangered Species List as it was no longer considered "endangered" or "threatened" under the ESA. NMFS has not designated gray whales as "depleted" under the MMPA. The Eastern North Pacific gray whale stock is not classified as "strategic" under the MMPA.

Humpback Whale

According to the 2013 Pacific Marine Mammal Stock Assessments Report (Appendix 3), the estimated population of the humpback whale California/Oregon/Washington stock is about 1,918 animals (NOAA 2014a). There are at least three separate stocks of humpback whales in the North Pacific, of which one population migrates and feeds along the west coast of the United States. This population winters in coastal waters of Mexico and Central America and migrates to areas ranging from the coast of California to southern British Columbia in summer/fall (Carretta *et al.*, 2010). Within this stock, regional abundance estimates vary among the feeding areas. Average abundance estimates ranged from 200 to 400 individuals for southern British Columbia/northern Washington, and 1,400 to 1,700 individuals for California/Oregon (Calambokidis *et al.*, 2012).

There is a high degree of site fidelity in these feeding ranges with almost no interchange between these two feeding regions. Humpback whales forage on a variety of crustaceans, other invertebrates, and forage fish. In their summer foraging areas, humpback whales tend to occupy shallow, coastal waters. In contrast, during their winter migrations, humpback whales tend to occupy deeper waters further offshore and are less likely to occupy shallow, coastal waters.

Humpback whales are sighted off the Washington and Oregon coasts regularly (Carretta *et al.*, 2010, Lagerquist and Mate 2002, Oleson *et al.*, 2009). Humpback whales are known to predictably forage an average of 22 mi (35.4 km) offshore of Grays Harbor, Washington during spring and summer months (Oleson *et al.*, 2009). Grays Harbor is approximately 45 mi (72.4 km) north of the project site. Oleson et al. (2009) documented 147 individual humpback whales foraging off Grays Harbor from 2004 to 2008, and foraging whales (1–19 whales sighted per day) were sighted on 50 percent of the days surveyed (22 of 44 survey days). Anecdotally, humpback whales are regularly spotted in areas about 15 (22.14 km) to 20 miles (32.18 km) offshore of MCR (Griffith 2015).

The Corps has limited fine-scale information about humpback whale foraging habits and space use along the Washington coast and does not have specific fine-scale information for the project area. Based on the available information, humpback whales may occur within 4.6 mi (7.4 km) of the MCR jetties or 8.6 mi (13.84 km) of shore (where in-water sound from pile driving activities may be audible) given both their general tendency to occupy shallow, coastal waters when foraging, and the available information on their fine-scale use of a proximate location.

Note that in September 2015, humpback whales were spotted near the Astoria-Megler Bridge located 14 mi

(22.53 km) from where the river meets the Pacific Ocean. This was thought to be an unusual occurrence. Their presence at that time may have been due to existing El Niño conditions that drove whales closer to shore in search of food (Wilson 2015). As of March 2016, NOAA determined that El Niño conditions are in decline (Becker 2016). As such, sightings that far up river are less likely to occur. Based on this information, humpback whales are likely to pass through and may forage intermittently in the project area offshore of the Jetty system.

Harbor Porpoise

The harbor porpoise inhabits temporal, subarctic, and arctic waters. In the eastern North Pacific, harbor porpoises range from Point Barrow, Alaska, to Point Conception, California. Harbor porpoise primarily frequent coastal waters and occur most frequently in waters less than 328 ft (100 m) deep (Hobbs and Waite 2010). They may occasionally be found in deeper offshore waters.

Harbor porpoise are known to occur year-round in the inland transboundary waters of Washington and British Columbia and along the Oregon/Washington coast. Aerial survey data from coastal Oregon and Washington, collected during all seasons, suggest that harbor porpoise distribution varies by depth. Although distinct seasonal changes in abundance along the west coast have been noted, and attributed to possible shifts in distribution to deeper offshore waters during late winter, seasonal movement patterns are not fully understood. Harbor porpoises are sighted regularly at the MCR (Griffith 2015, Carretta *et al.,* 2014).

According to the online database, Ocean Biogeographic Information System, Spatial Ecological Analysis of Megavertebrate Populations (Halpin *et al.,* 2009), West Coast populations have more restricted movements and do not migrate as much as East Coast populations. Most harbor porpoise groups are small, generally consisting of less than five or six individuals, though for feeding or migration they may aggregate into large, loose groups of 50 to several hundred animals. Behavior tends to be inconspicuous, compared to most dolphins, and they feed by seizing prey which consists of a wide variety of fish and cephalopods, ranging from benthic or demersal.

The Northern Oregon/Washington coast stock of harbor porpoise inhabits the waters near the proposed project area. The population estimate for this stock is calculated at 21,847 with a minimum population estimate of 15,123 (Carretta *et al.,* 2014).

Harbor porpoise are not listed as "depleted" under the MMPA, listed as "threatened" or "endangered" under the ESA, or classified as "strategic."

Pinnipeds

Steller Sea Lion

The Steller sea lion is a pinniped and the largest of the eared seals. Steller sea lion populations that primarily occur east of 144° W (Cape Suckling, Alaska) comprise the Eastern Distinct Population Segment (DPS), which was de-listed and removed from the Endangered Species List on November 4, 2013 (78 FR 66140). This stock is found in the vicinity of MCR. The population west of 144° W longitude comprises the Western DPS, which is listed as endangered, based largely on over-fishing of the seal's food supply.

The range of the Steller sea lion includes the North Pacific Ocean rim from California to northern Japan. Steller sea lions forage in nearshore and pelagic waters where they are opportunistic predators. They feed primarily on a wide variety of fishes and cephalopods. Steller sea lions use terrestrial haulout sites to rest and take refuge. They also gather on well-defined, traditionally used rookeries to pup and breed. These habitats are typically gravel, rocky, or sand beaches; ledges, or rocky reefs (Allen and Angliss, 2013).

The MCR South Jetty is used by Steller sea lions for hauling out and is not designated critical habitat. Use occurs chiefly at the concrete block structure at the terminus, or head of the jetty, and at the emergent rubble mound made up of the eroding jetty trunk near the terminus.

Previous monthly averages between 1995 and 2004 for Steller sea lions hauled-out at the South Jetty head ranged from about 168 to 1,106 animals. More recent data from Oregon Department of Fish and Wildlife (ODFW) from 2000–2014 reflects a lower frequency of surveys, and numbers ranged from zero animals to 606 Steller sea lions (ODFW 2014). More frequent surveys by the Washington Department of Fish and Wildlife (WDFW) for the same time frame (2000–2014) put the monthly range at 177 to 1,663 animals throughout the year. According to ODFW (2014), most counts determined that animals remain at or near the jetty tip.

Steller sea lions are present all year, in varying abundances, as is shown in the Corps application. Abundance is typically lower as the summer progresses when adults are at the breeding rookeries. Steller sea lions are most abundant in the vicinity during the winter months and tend to disperse elsewhere to rookeries during breeding season between May and July. Abundance increases following the breeding season. However, this is not always true as evidenced by a flyover count of the South Jetty on May 23, 2007, where 1,146 Steller sea lions were observed on the concrete block structure and none on the rubble mound (ODFW 2007). Those counts represent a high-use day on the South Jetty. According to ODFW (2014), during the summer months it is not uncommon to observe between 500–1,000 Steller sea lions present per day, the majority of which are immature males and females (no pups or pregnant females). All population age classes, and both males and females, use the South Jetty to haul out. Only non-breeding individuals are typically found on the jetty during May-July, and a greater percentage of juveniles are present. It is likely that there is turnover in sea lions using the jetty. That is, the 100 or so sea lions hauled out one week might not be the same individuals hauled out the following week. Recent ODFW and WDFW survey data continue to support these findings. The most recent estimate from 2007 put the populations between 63,160 and 78,198 (Allen and Angliss, 2013). The best available information indicates the eastern stock of Steller sea lion increased at a rate of 4.18 percent per year between 1979 and 2010 based on an analysis of pup counts in California, Oregon, British Columbia and Southeast Alaska (Allen and Angliss, 2013).

California Sea Lion

California sea lions are found along the west coast from the southern tip of Baja California to southeast Alaska. They breed mainly on offshore islands from Southern California's Channel Islands south to Mexico. Non-breeding males often roam north in spring foraging for food. Since the mid-1980s, increasing numbers of California sea lions have been documented feeding on fish along the Washington coast and—more recently—in the Columbia River as far upstream as Bonneville Dam, 145 mi (233 km) from the river mouth. The population size of the U.S. stock of California sea lions is estimated at 296,750 animals (Carretta *et al.,* 2014). As with Steller sea lions, according to ODFW (2014) most counts of California sea lions are also concentrated near the tip of the jetty, although animals sometimes haul out about halfway down the jetty. Survey information (2007 and 2014) from ODFW indicates that California sea lions are relatively less prevalent in the Pacific Northwest during June and July; though in the months just before and after their absence several hundred may be observed using the South Jetty. More frequent WDFW surveys (2014) indicate greater numbers in the summer, and use remains concentrated to fall and winter months. Nearly all California sea lions in the Pacific Northwest are sub-adult and adult males (females and young generally stay in California). Again, turnover of sea lions using the jetty is likely (ODFW 2014).

California sea lions in the United States are not listed as "endangered" or "threatened" under the Endangered Species Act, classified as "depleted" under the MMPA, or listed as "strategic" under the MMPA.

Harbor Seal

Harbor seals range from Baja California, north along the western coasts of the United States, British Columbia and southeast Alaska, west through the Gulf of Alaska, Prince William Sound, and the Aleutian Islands, and north in the Bering Sea to Cape Newenham and the Pribilof Islands. They haul out on rocks, reefs, beaches, and drifting glacial ice and feed in marine, estuarine, and occasionally fresh waters. Harbor seals generally are non-migratory, with local movements associated with tides, weather, season, food availability, and reproduction. Harbor seals do not make extensive pelagic migrations, though some long distance movement of tagged animals in Alaska (559mi/900 km) and along the west coast of the United States (up to 341 mi/550 km) have been recorded. Harbor seals have also displayed strong fidelity to haulout sites (Carretta *et al.*, 2014).

The 1999 harbor seal population estimate for the Oregon/Washington Coast stock was about 24,732 animals. However, the data used was over eight years old; and therefore, there are no current abundance estimates. Harbor seals are not considered to be "depleted" under the MMPA or listed as "threatened" or "endangered" under the ESA. The Oregon/Washington coast stock of harbor seals is not classified as a "strategic" stock under the MMPA (Carretta *et al.*, 2014).

Further information on the biology and local distribution of these species can be found in the Corps application available online at: *http://www.nmfs.noaa.gov/pr/permits/incidental/construction.htm* and the NMFS Marine Mammal Stock Assessment Reports, which may be found at: *http://www.nmfs.noaa.gov/pr/species/.*

Potential Effects of the Specified Activity on Marine Mammals and Their Habitat

This section includes a summary and discussion of the ways that stressors, (*e.g.* pile driving) and potential mitigation activities, associated with the MCR jetty rehabilitation project, may impact marine mammals and their habitat. The *Estimated Take by Incidental Harassment* section will include an analysis of the number of individuals that are expected to be taken by this activity. The *Estimated Take by Incidental Harassment* section, together with the *Proposed Mitigation* section will also draw conclusions regarding the likely impacts of this activity on the reproductive success or survivorship of individuals and, from that, on the affected marine mammal populations or stocks. The *Negligible Impact Analysis* section will include the analysis of how this specific activity will impact marine mammals. In this section, we provide general background information on sound and marine mammal hearing before considering potential effects to marine mammals from sound produced by vibratory pile driving.

Sound travels in waves, the basic components of which are frequency, wavelength, velocity, and amplitude. Frequency is the number of pressure waves that pass by a reference point per unit of time and is measured in hertz (Hz) or cycles per second. Wavelength is the distance between two peaks of a sound wave; lower frequency sounds have longer wavelengths than higher frequency sounds and attenuate (decrease) more rapidly in shallower water. Amplitude is the height of the sound pressure wave or "loudness" of a sound and is typically measured using the decibel (dB) scale. A dB is the ratio between a measured pressure (with sound) and a reference pressure (sound at a constant pressure, established by scientific standards). It is a logarithmic unit that accounts for large variations in amplitude; therefore, relatively small changes in dB ratings correspond to large changes in sound pressure. When referring to sound pressure levels (SPLs; the sound force per unit area), sound is referenced in the context of underwater sound pressure to 1 microPascal (μPa). One pascal is the pressure resulting from a force of one newton exerted over an area of one square meter. The source level (SL) represents the sound level at a distance of 1 m from the source (referenced to 1 μPa). The received level is the sound level at the listener's position. Note that all underwater sound levels in this document are referenced to a pressure of 1 μPa, and all airborne sound levels in this document are referenced to a pressure of 20 μPa.

Root mean square (rms) is the quadratic mean sound pressure over the duration of an impulse. Rms is calculated by squaring all of the sound amplitudes, averaging the squares, and then taking the square root of the average (Urick 1983). Rms accounts for both positive and negative values; squaring the pressures makes all values positive so that they may be accounted for in the summation of pressure levels (Hastings and Popper, 2005). This measurement is often used in the context of discussing behavioral effects, in part because behavioral effects, which often result from auditory cues, may be better expressed through averaged units than by peak pressures.

When underwater objects vibrate or activity occurs, sound-pressure waves are created. These waves alternately compress and decompress the water as the sound wave travels. Underwater sound waves radiate in all directions away from the source (similar to ripples on the surface of a pond), except in cases where the source is directional. The compressions and decompressions associated with sound waves are detected as changes in pressure by aquatic life and man-made sound receptors such as hydrophones.

Even in the absence of sound from the specified activity, the underwater environment is typically loud due to ambient sound. Ambient sound is defined as environmental background sound levels lacking a single source or point (Richardson *et al.*, 1995), and the sound level of a region is defined by the total acoustical energy being generated by known and unknown sources. These sources may include physical (*e.g.*, waves, earthquakes, ice, atmospheric sound), biological (*e.g.*, sounds produced by marine mammals, fish, and invertebrates), and anthropogenic sound (*e.g.*, vessels, dredging, aircraft, construction). A number of sources contribute to ambient sound, including the following (Richardson *et al.*, 1995):

- Wind and waves: The complex interactions between wind and water surface, including processes such as breaking waves and wave-induced bubble oscillations and cavitation, are a main source of naturally occurring ambient noise for frequencies between 200 Hz and 50 kHz (Mitson 1995). In general, ambient sound levels tend to increase with increasing wind speed and wave height. Surf noise becomes important near shore, with measurements collected at a distance of

5.2 mi (8.5 km) from shore showing an increase of 10 dB in the 100 to 700 Hz band during heavy surf conditions.

- Precipitation: Sound from rain and hail impacting the water surface can become an important component of total noise at frequencies above 500 Hz, and possibly down to 100 Hz during quiet times.
- Biological: Marine mammals can contribute significantly to ambient noise levels, as can some fish and shrimp. The frequency band for biological contributions is from approximately 12 Hz to over 100 kHz.
- Anthropogenic: Sources of ambient noise related to human activity include transportation (surface vessels and aircraft), dredging and construction, oil and gas drilling and production, seismic surveys, sonar, explosions, and ocean acoustic studies. Shipping noise typically dominates the total ambient noise for frequencies between 20 and 300 Hz. In general, the frequencies of anthropogenic sounds are below 1 kHz and, if higher frequency sound levels are created, they attenuate rapidly (Richardson *et al.*, 1995). Sound from identifiable anthropogenic sources other than the activity of interest (*e.g.*, a passing vessel) is sometimes termed background sound, as opposed to ambient sound. Representative levels of anthropogenic sound are displayed in Table 2.

TABLE 2—REPRESENTATIVE SOUND LEVELS OF ANTHROPOGENIC SOURCES

Sound source	Frequency range (Hz)	Underwater sound level	Reference
Small vessels	250–1,000	151 dB rms at 1 m	Richardson *et al.*, 1995.
Tug docking gravel barge	200–1,000	149 dB rms at 100 m	Blackwell and Greene, 2002.
Vibratory driving of 72-in steel pipe pile	10–1,500	180 dB rms at 10 m	Reyff, 2007.
Impact driving of 36-in steel pipe pile	10–1,500	195 dB rms at 10 m	Laughlin, 2007.
Impact driving of 66-in cast-in-steel-shell (CISS) pile.	10–1,500	195 dB rms at 10 m	Reviewed in Hastings and Popper, 2005.

The sum of the various natural and anthropogenic sound sources at any given location and time—which comprise "ambient" or "background" sound—depends not only on the source levels (as determined by current weather conditions and levels of biological and shipping activity) but also on the ability of sound to propagate through the environment. In turn, sound propagation is dependent on the spatially and temporally varying properties of the water column and sea floor and is frequency-dependent. As a result of the dependence on a large number of varying factors, ambient sound levels can be expected to vary widely over both coarse and fine spatial and temporal scales. Sound levels at a given frequency and location can vary by 10–20 dB from day to day (Richardson *et al.*, 1995). The result is that, depending on the source type and its intensity, sound from the specified activity may be a negligible addition to the local environment or could form a distinctive signal that may affect marine mammals.

Marine Mammal Hearing

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms have been derived using auditory evoked potentials, anatomical modeling, and other data. Southall *et al.* (2007) designate "functional hearing groups" for marine mammals and estimate the lower and upper frequencies of functional hearing of the groups. The functional groups and the associated frequencies are indicated below (though animals are less sensitive to sounds at the outer edge of their functional range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their functional hearing range):

- Low frequency cetaceans (13 species of mysticetes): Functional hearing is estimated to occur between approximately 7 Hz and 25 kHz;
- Mid-frequency cetaceans (32 species of dolphins, 6 species of larger toothed whales, and 19 species of beaked and bottlenose whales): Functional hearing is estimated to occur between approximately 150 Hz and 160 kHz;
- High frequency cetaceans (8 species of true porpoises, 6 species of river dolphins, Kogia, the franciscana, and four species of cephalorhynchids): Functional hearing is estimated to occur between approximately 200 Hz and 180 kHz;
- Phocid pinnipeds in water: Functional hearing is estimated to occur between approximately 75 Hz and 100 kHz; and
- Otariid pinnipeds in water: Functional hearing is estimated to occur between approximately 100 Hz and 48 kHz.

Of the four cetacean species likely to occur in the proposed project area, one is classified as low-frequency cetaceans (*i.e.*, humpback, gray whales), one is classified as a mid-frequency cetacean (*i.e.*, killer whale), and one is classified as a high-frequency cetacean (*i.e.*, harbor porpoise) (Southall *et al.*, 2007). Additionally, harbor seals are classified as members of the phocid pinnipeds in water functional hearing group while Steller sea lions and California sea lions are grouped under the otariid pinnipeds in water functional hearing group. A species' functional hearing group is a consideration when we analyze the effects of exposure to sound on marine mammals.

Acoustic Impacts

Potential Effects of Pile Driving Sound—The effects of sounds from pile driving might result in one or more of the following: Temporary or permanent hearing impairment, non-auditory physical or physiological effects, behavioral disturbance, and masking (Richardson *et al.*, 1995; Gordon *et al.*, 2004; Nowacek *et al.*, 2007; Southall *et al.*, 2007). The effects of pile driving on marine mammals are dependent on several factors, including the size, type, and depth of the animal; the depth, intensity, and duration of the pile driving sound; the depth of the water column; the substrate of the habitat; the standoff distance between the pile and the animal; and the sound propagation properties of the environment. Impacts to marine mammals from pile driving activities are expected to result primarily from acoustic pathways. As such, the degree of effect is intrinsically related to the received level and duration of the sound exposure, which are in turn influenced by the distance between the animal and the source. The further away from the source, the less intense the exposure should be. The substrate and depth of the habitat affect the sound propagation properties of the environment. Shallow environments are typically more structurally complex, which leads to rapid sound attenuation. In addition, substrates that are soft (*e.g.*, sand) would absorb or attenuate the sound more readily than hard substrates (*e.g.*, rock) which may reflect the acoustic wave. Soft porous substrates would also likely require less time to drive the pile, and possibly less forceful equipment, which would ultimately decrease the intensity of the acoustic source.

In the absence of mitigation, impacts to marine species would be expected to result from physiological and behavioral responses to both the type and strength of the acoustic signature (Viada *et al.*, 2008). The type and severity of behavioral impacts are more difficult to define due to limited studies addressing the behavioral effects of impulse sounds on marine mammals. Potential effects from impulse sound sources can range in severity from effects such as behavioral disturbance or tactile perception to physical discomfort, slight injury of the internal organs and the auditory system, or mortality (Yelverton *et al.*, 1973).

Hearing Impairment and Other Physical Effects—Marine mammals exposed to high intensity sound repeatedly or for prolonged periods can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Kastak *et al.*, 1999; Schlundt *et al.*, 2000; Finneran *et al.*, 2002, 2005). TS can be permanent (PTS), in which case the loss of hearing sensitivity is not recoverable, or temporary (TTS), in which case the animal's hearing threshold would recover over time (Southall *et al.*, 2007). Marine mammals depend on acoustic cues for vital biological functions, (*e.g.*, orientation, communication, finding prey, avoiding predators); thus, TTS may result in reduced fitness in survival and reproduction. However, this depends on the frequency and duration of TTS, as well as the biological context in which it occurs. TTS of limited duration, occurring in a frequency range that does not coincide with that used for recognition of important acoustic cues, would have little to no effect on an animal's fitness. Repeated sound exposure that leads to TTS could cause PTS. PTS constitutes injury, but TTS does not (Southall *et al.*, 2007). The following subsections discuss in somewhat more detail the possibilities of TTS, PTS, and non-auditory physical effects.

Temporary Threshold Shift—TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter 1985). While experiencing TTS, the hearing threshold rises, and a sound must be stronger in order to be heard. In terrestrial mammals, TTS can last from minutes or hours to days (in cases of strong TTS). For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the sound ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound. Available data on TTS in marine mammals are summarized in Southall *et al.* (2007).

Given the available data, the received level of a single pulse (with no frequency weighting) might need to be approximately 186 dB re 1 μPa^2-s (*i.e.*, 186 dB sound exposure level (SEL) or approximately 221–226 dB p-p (peak)) in order to produce brief, mild TTS. Exposure to several strong pulses that each have received levels near 190 dB rms (175–180 dB SEL) might result in cumulative exposure of approximately 186 dB SEL and thus slight TTS in a small odontocete, assuming the TTS threshold is (to a first approximation) a function of the total received pulse energy.

The above TTS information for odontocetes is derived from studies on the bottlenose dolphin (*Tursiops truncatus*) and beluga whale (*Delphinapterus leucas*). There is no published TTS information for other species of cetaceans. However, preliminary evidence from a harbor porpoise exposed to pulsed sound suggests that its TTS threshold may have been lower (Lucke *et al.*, 2009). As summarized above, data that are now available imply that TTS is unlikely to occur unless odontocetes are exposed to pile driving pulses stronger than 180 dB re 1 μPa (rms).

Permanent Threshold Shift—When PTS occurs, there is physical damage to the sound receptors in the ear. In severe cases, there can be total or partial deafness, while in other cases the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter 1985). There is no specific evidence that exposure to pulses of sound can cause PTS in any marine mammal. However, given the possibility that mammals close to a sound source can incur TTS, it is possible that some individuals might incur PTS. Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage, but repeated or (in some cases) single exposures to a level well above that causing TTS onset might elicit PTS.

Relationships between TTS and PTS thresholds have not been studied in marine mammals but are assumed to be similar to those in humans and other terrestrial mammals, based on anatomical similarities. PTS might occur at a received sound level at least several decibels above that inducing mild TTS if the animal were exposed to strong sound pulses with rapid rise time. Based on data from terrestrial mammals, a precautionary assumption is that the PTS threshold for impulse sounds (such as pile driving pulses as received close to the source) is at least six dB higher than the TTS threshold on a peak-pressure basis and probably greater than six dB (Southall *et al.*, 2007). On an SEL basis, Southall *et al.* (2007) estimated that received levels would need to exceed the TTS threshold by at least 15 dB for there to be risk of PTS. Thus, for cetaceans, Southall *et al.* (2007) estimate that the PTS threshold might be an M-weighted SEL (for the sequence of received pulses) of approximately 198 dB re 1 μPa^2-s (15 dB higher than the TTS threshold for an impulse). Given the higher level of sound necessary to cause PTS as compared with TTS, it is considerably less likely that PTS could occur.

Measured source levels from impact pile driving can be as high as 214 dB rms. Although no marine mammals have been shown to experience TTS or PTS as a result of being exposed to pile driving activities, captive bottlenose dolphins and beluga whales exhibited changes in behavior when exposed to strong pulsed sounds (Finneran *et al.*, 2000, 2005). The animals tolerated high received levels of sound before exhibiting aversive behaviors. Experiments on a beluga whale showed that exposure to a single watergun impulse at a received level of 207 kPa (30 psi) p-p, which is equivalent to 228 dB p-p, resulted in a 7 and 6 dB TTS in the beluga whale at 0.4 and 30 kHz, respectively. Thresholds returned to within 2 dB of the pre-exposure level within four minutes of the exposure (Finneran *et al.*, 2002). Although the source level of pile driving from one hammer strike is expected to be much lower than the single watergun impulse cited here, animals being exposed for a prolonged period to repeated hammer strikes could receive more sound exposure in terms of SEL than from the single watergun impulse (estimated at 188 dB re 1 μPa^2-s) in the aforementioned experiment (Finneran *et al.*, 2002). However, in order for marine mammals to experience TTS or PTS, the animals have to be close enough to be exposed to high intensity sound levels for a prolonged period of time. Based on the best scientific information available, these SPLs are far below the thresholds that could cause TTS or the onset of PTS.

Non-auditory Physiological Effects—Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to strong underwater sound include stress, neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007). Studies examining such effects are limited. In general, little is known about the potential for pile driving to cause auditory impairment or other physical effects in marine mammals. Available data suggest that such effects, if they occur at all, would presumably be limited to short distances from the sound source and to activities that extend over a prolonged period. The available data do not allow identification of a specific exposure level above which non-auditory effects can be expected (Southall *et al.,* 2007) or any meaningful quantitative predictions of the numbers (if any) of marine mammals that might be affected in those ways. Marine mammals that show behavioral avoidance of pile driving, including some odontocetes and some pinnipeds, are especially unlikely to incur auditory impairment or non-auditory physical effects.

Disturbance Reactions

Disturbance includes a variety of effects, including subtle changes in behavior, more conspicuous changes in activities, and displacement. Behavioral responses to sound are highly variable and context-specific and reactions, if any, depend on species, state of maturity, experience, current activity, reproductive state, auditory sensitivity, time of day, and many other factors (Richardson *et al.,* 1995; Wartzok *et al.,* 2003; Southall *et al.,* 2007).

Habituation can occur when an animal's response to a stimulus wanes with repeated exposure, usually in the absence of unpleasant associated events (Wartzok *et al.,* 2003). Animals are most likely to habituate to sounds that are predictable and unvarying. The opposite process is sensitization, when an unpleasant experience leads to subsequent responses, often in the form of avoidance, at a lower level of exposure. Behavioral state may affect the type of response as well. For example, animals that are resting may show greater behavioral change in response to disturbing sound levels than animals that are highly motivated to remain in an area for feeding (Richardson *et al.,* 1995; NRC, 2003; Wartzok *et al.,* 2003).

Controlled experiments with captive marine mammals showed pronounced behavioral reactions, including avoidance of loud sound sources (Ridgway *et al.,* 1997; Finneran *et al.,* 2000). Observed responses of wild marine mammals to loud pulsed sound sources (typically seismic guns or acoustic harassment devices, but also including pile driving) have been varied but often consist of avoidance behavior or other behavioral changes suggesting discomfort (Morton and Symonds, 2002; Thorson and Reyff, 2006; see also Gordon *et al.,* 2004; Wartzok *et al.,* 2003; Nowacek *et al.,* 2007). Responses to continuous sound, such as vibratory pile installation, have not been documented as well as responses to pulsed sounds.

With both types of pile driving, it is likely that the onset of pile driving could result in temporary, short term changes in an animal's typical behavior and/or avoidance of the affected area. These behavioral changes may include (Richardson *et al.,* 1995): Changing durations of surfacing and dives; number of blows per surfacing; moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where sound sources are located; and/or flight responses (*e.g.,* pinnipeds flushing into water from haul-outs or rookeries). Pinnipeds may increase their haul-out time, possibly to avoid in-water disturbance (Thorson and Reyff, 2006).

The biological significance of many of these behavioral disturbances is difficult to predict, especially if the detected disturbances appear minor. However, the consequences of behavioral modification could be expected to be biologically significant if the change affects growth, survival, or reproduction. Significant behavioral modifications that could potentially lead to effects on growth, survival, or reproduction include:

- Drastic changes in diving/surfacing patterns (such as those thought to cause beaked whale stranding due to exposure to military mid-frequency tactical sonar);
- Habitat abandonment due to loss of desirable acoustic environment; and
- Cessation of feeding or social interaction.

The onset of behavioral disturbance from anthropogenic sound depends on both external factors (characteristics of sound sources and their paths) and the specific characteristics of the receiving animals (hearing, motivation, experience, demography) and is difficult to predict (Southall *et al.,* 2007).

Auditory Masking—Natural and artificial sounds can disrupt behavior by masking, or interfering with, a marine mammal's ability to hear other sounds. Masking occurs when the receipt of a sound is interfered with by another coincident sound at similar frequencies and at similar or higher levels. Chronic exposure to excessive, though not high-intensity, sound could cause masking at particular frequencies for marine mammals that utilize sound for vital biological functions. Masking can interfere with detection of acoustic signals such as communication calls, echolocation sounds, and environmental sounds important to marine mammals. Therefore, under certain circumstances, marine mammals whose acoustical sensors or environment are being severely masked could also be impaired from maximizing their performance fitness in survival and reproduction. If the coincident (masking) sound were anthropogenic, it could be potentially harassing if it disrupted hearing-related behavior. It is important to distinguish TTS and PTS, which persist after the sound exposure, from masking, which occurs only during the sound exposure. Because masking (without resulting in TS) is not associated with abnormal physiological function, it is not considered a physiological effect, but rather a potential behavioral effect.

Masking occurs at the frequency band which the animals utilize so the frequency range of the potentially masking sound is important in determining any potential behavioral impacts. Because sound generated from in-water vibratory pile driving is mostly concentrated at low frequency ranges, it may have less effect on high frequency echolocation sounds made by porpoises. However, lower frequency man-made sounds are more likely to affect detection of communication calls and other potentially important natural sounds such as surf and prey sound. It may also affect communication signals when they occur near the sound band and thus reduce the communication space of animals (Clark *et al.,* 2009) and cause increased stress levels (Foote *et al.,* 2004; Holt *et al.,* 2009).

Masking has the potential to impact species at the population or community levels as well as at individual levels. Masking affects both senders and receivers of the signals and can potentially have long-term chronic effects on marine mammal species and populations. Recent research suggests that low frequency ambient sound levels have increased by as much as 20 dB (more than three times in terms of SPL) in the world's ocean from pre-industrial periods, and that most of these increases are from distant shipping (Hildebrand, 2009). All anthropogenic sound sources, such as those from vessel traffic, pile driving, and dredging activities, contribute to the elevated ambient sound levels, thus intensifying masking.

Vibratory pile driving is relatively short-term, with rapid oscillations occurring for 10 to 30 minutes per installed pile. It is possible that vibratory pile driving resulting from this proposed action may mask acoustic signals important to the behavior and survival of marine mammal species, but the short-term duration and limited affected area would result in insignificant impacts from masking. Any masking event that could possibly rise to Level B harassment under the MMPA would occur concurrently within the zones of behavioral harassment already estimated for vibratory pile driving, and which have already been taken into account in the exposure analysis.

Acoustic Effects, Airborne—Marine mammals that occur in the project area could be exposed to airborne sounds associated with pile driving that have the potential to cause harassment, depending on their distance from pile driving activities. Airborne pile driving sound would have less impact on cetaceans than pinnipeds because sound from atmospheric sources does not transmit well underwater (Richardson *et al.*, 1995); thus, airborne sound would only be an issue for pinnipeds either hauled-out or looking with heads above water in the project area. Most likely, airborne sound would cause behavioral responses similar to those discussed above in relation to underwater sound. For instance, anthropogenic sound could cause hauled-out pinnipeds to exhibit changes in their normal behavior, such as reduction in vocalizations, or cause them to temporarily abandon their habitat and move further from the source. Studies by Blackwell *et al.* (2002) and Moulton *et al.* (2005) indicate a tolerance or lack of response to unweighted airborne sounds as high as 112 dB peak and 96 dB rms.

Vessel Interaction

Besides being susceptible to vessel strikes, cetacean and pinniped responses to vessels may result in behavioral changes, including greater variability in the dive, surfacing, and respiration patterns; changes in vocalizations; and changes in swimming speed or direction (NRC 2003). There will be a temporary and localized increase in vessel traffic during construction. A maximum of three work barges will be present at any time during the in-water and over water work. The barges will be located in close proximity to each other near the construction site.

Potential Effects on Marine Mammal Habitat

The primary potential impacts to marine mammal habitat are associated with elevated sound levels produced by vibratory and impact pile driving and removal in the area. However, other potential impacts to the surrounding habitat from physical disturbance are also possible.

Potential Pile Driving Effects on Prey—Construction activities would produce continuous (*i.e.*, vibratory pile driving) sounds. Fish react to sounds that are especially strong and/or intermittent low-frequency sounds. Short duration, sharp sounds can cause overt or subtle changes in fish behavior and local distribution. Hastings and Popper (2005) identified several studies that suggest fish may relocate to avoid certain areas of sound energy. Additional studies have documented effects of pile driving on fish, although several are based on studies in support of large, multiyear bridge construction projects (*e.g.*, Scholik and Yan, 2001, 2002; Popper and Hastings, 2009). Sound pulses at received levels of 160 dB may cause subtle changes in fish behavior. SPLs of 180 dB may cause noticeable changes in behavior (Pearson *et al.*, 1992; Skalski *et al.*, 1992). SPLs of sufficient strength have been known to cause injury to fish and fish mortality. The most likely impact to fish from pile driving activities at the project area would be temporary behavioral avoidance of the area. The duration of fish avoidance of this area after pile driving stops is unknown, but a rapid return to normal recruitment, distribution, and behavior is anticipated. Additionally, NMFS developed a Biological Opinion in 2011 which indicated that no adverse effects were anticipated for critical habitat of prey species for marine mammals. In general, impacts to marine mammal prey species are expected to be minor and temporary due to the short timeframe for the project.

Effects to Foraging Habitat—Pile installation may temporarily increase turbidity resulting from suspended sediments. Any increases would be temporary, localized, and minimal. The Corps must comply with state water quality standards during these operations by limiting the extent of turbidity to the immediate project area. In general, turbidity associated with pile installation is localized to about a 25-ft (7.62 m) radius around the pile (Everitt *et al.*, 1980). Cetaceans are not expected to be close enough to the project pile driving areas to experience effects of turbidity, and any pinnipeds will be transiting the terminal area and could avoid localized areas of turbidity. Therefore, the impact from increased turbidity levels is expected to be discountable to marine mammals. Furthermore, pile driving and removal at the project site will not obstruct movements or migration of marine mammals.

Natural tidal currents and flow patterns in MCR waters routinely disturb sediments. High volume tidal events can result in hydraulic forces that re-suspend benthic sediments, temporarily elevating turbidity locally. Any temporary increase in turbidity as a result of the proposed action is not anticipated to measurably exceed levels caused by these normal, natural periods.

Proposed Mitigation

In order to issue an LOA under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, "and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking" for certain subsistence uses.

For the proposed mitigation measures, the Corps listed the following protocols to be implemented during its proposed jetty rehabilitation program at MCR.

1. Briefings With Construction Crew, Marine Mammal Monitoring Team and Corps Staff

The Corps will conduct briefings between construction supervisors and crews, the marine mammal monitoring team, and Corps staff prior to the start of all pile driving activity in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures.

2. Vibratory Hammer

All pile driving and removal activities will be conducted only using a vibratory hammer.

3. Shutdown and Disturbance Zones

The shutdown zone will include all areas where the underwater SPLs are anticipated to equal or exceed the Level A (injury) criteria for marine mammals

(180 dB isopleth for cetaceans; 190 dB isopleth for pinnipeds). The shutdown zone will always be a minimum of 66 ft (20 m) to prevent injury from physical interaction of marine mammals with construction equipment. The Level B harassment zone would extend 4.6 mi (7.4 km) from the sound source. The Level A and B harassment thresholds are depicted in Table 4 found later in the *Estimated Take by Incidental Harassment* section.

For in-water heavy machinery work other than pile driving (using, *e.g.*, standard barges, tug boats, barge-mounted excavators, or clamshell equipment used to place or remove material), if a marine mammal comes within 66 ft (20 m), operations shall cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions. This type of work could include the following activities: (1) Movement of the barge to the pile location or (2) positioning of the pile on the substrate via a crane (*i.e.*, stabbing the pile).

If the shutdown zone is obscured by fog or poor lighting conditions, pile driving will not be initiated until the entire shutdown zone is visible.

A monitoring plan will be implemented as described in Sections 13 and 16 of the Application. This plan includes shutdown zones and specific procedures in the event a mammal is encountered.

If a marine mammal approaches or enters the injury zone during pile driving, work will be halted and delayed until either the animal's voluntary departure has been visually confirmed beyond the disturbance zone, or 15 minutes for pinnipeds or 30 minutes for cetaceans have passed without re-detection of the animal.

Marine Mammal Observers (MMO) will scan the waters for 30 minutes before and during all pile driving. If any species for which take is not authorized are observed within the area of potential sound effects during or 30 minutes before pile driving, the observer(s) will immediately notify the on-site supervisor or inspector, and require that pile driving either not initiate or temporarily cease until the animals have moved outside of the area of potential sound effects.

Work would occur only during daylight hours, when visual monitoring of marine mammals can be conducted. In order to minimize impact to Southern Resident killer whales, in-water work will not be conducted during their primary feeding season extending from October 1 until May 1. Installation could occur from May 1 through September 30 each year.

If between May 1 and July 1 any killer whales are observed within the area of zone of influence (ZOI), comprising the Level A and Level B thresholds, the Corps will immediately shut down all pile installation, removal, or maintenance activities. Operations will either remain shutdown or will not be initiated until all killer whales have moved outside of the area of the ZOI. In order to avoid take of endangered Southern Resident killer whales, which may be indistinguishable from transient whales, after July 1 until September 30 all killer whales will be assumed to be transients. No shutdown is required for killer whales observed after July 1 until September 30 in the Level B harassment zone, but animals must be recorded as Level B takes in the approved monitoring forms.

Mitigation Conclusions

NMFS has carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of affecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation,

Any mitigation measure(s) prescribed by NMFS should be able to accomplish, have a reasonable likelihood of accomplishing (based on current science), or contribute to the accomplishment of one or more of the general goals listed below:

1. Avoidance or minimization of injury or death of marine mammals wherever possible (goals 2, 3, and 4 may contribute to this goal);
2. A reduction in the numbers of marine mammals (total number or number at biologically important time or location) exposed to received levels of pile driving, or other activities expected to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only);
3. A reduction in the number of times (total number or number at biologically important time or location) individuals would be exposed to received levels of pile driving, or other activities expected to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only);
4. A reduction in the intensity of exposures (either total number or number at biologically important time or location) to received levels of pile driving, or other activities expected to result in the take of marine mammals (this goal may contribute to a, above, or to reducing the severity of harassment takes only);
5. Avoidance or minimization of adverse effects to marine mammal habitat, paying special attention to the food base, activities that block or limit passage to or from biologically important areas, permanent destruction of habitat, or temporary destruction/disturbance of habitat during a biologically important time; and
6. For monitoring directly related to mitigation—an increase in the probability of detecting marine mammals, thus allowing for more effective implementation of the mitigation.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammals species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an Incidental Take Authorization (ITA) for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth "requirements pertaining to the monitoring and reporting of such taking." The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. The Corps submitted information regarding marine mammal monitoring to be conducted during pile driving and removal operations as part of the proposed rule application. That information can be found in sections 13 and 16 of the application. The monitoring measures may be modified or supplemented based on comments or new information received from the public during the public comment period.

Monitoring measures proposed by the applicant or prescribed by NMFS should contribute to or accomplish one or more of the following top-level goals:

1. An increase in our understanding of the likely occurrence of marine mammal species in the vicinity of the action, *i.e.*, presence, abundance, distribution, and/or density of species.

2. An increase in our understanding of the nature, scope, or context of the likely exposure of marine mammal species to any of the potential stressor(s) associated with the action (*e.g.*, sound or visual stimuli), through better understanding of one or more of the following: The action itself and its environment (*e.g.*, sound source characterization, propagation, and ambient noise levels); the affected species (*e.g.*, life history or dive pattern); the likely co-occurrence of marine mammal species with the action (in whole or part) associated with specific adverse effects; and/or the likely biological or behavioral context of exposure to the stressor for the marine mammal (*e.g.*, age class of exposed animals or known pupping, calving or feeding areas).

3. An increase in our understanding of how individual marine mammals respond (behaviorally or physiologically) to the specific stressors associated with the action (in specific contexts, where possible, *e.g.*, at what distance or received level).

4. An increase in our understanding of how anticipated individual responses, to individual stressors or anticipated combinations of stressors, may impact either: The long-term fitness and survival of an individual; or the population, species, or stock (*e.g.*, through effects on annual rates of recruitment or survival).

5. An increase in our understanding of how the activity affects marine mammal habitat, such as through effects on prey sources or acoustic habitat (*e.g.*, through characterization of longer-term contributions of multiple sound sources to rising ambient noise levels and assessment of the potential chronic effects on marine mammals).

6. An increase in understanding of the impacts of the activity on marine mammals in combination with the impacts of other anthropogenic activities or natural factors occurring in the region.

7. An increase in our understanding of the effectiveness of mitigation and monitoring measures.

8. An increase in the probability of detecting marine mammals (through improved technology or methodology), both specifically within the safety zone (thus allowing for more effective implementation of the mitigation) and in general, to better achieve the above goals.

Proposed Monitoring Measures

1. Visual Vessel-Based Monitoring

The Corps will employ one or two vessels to monitor shutdown and disturbance zones for pile-driving and removal activities at the North Jetty and South Jetty offloading facilities. Section 16 of the Application indicates roughly where these vessels will be located. These vessels will be traversing across the delineated disturbance zones associated with the site at which active pile driving is occurring.

2. Visual Shore-Based Monitoring

- Visual monitoring will be conducted by qualified, trained MMOs. Visual monitoring will be implemented during all pile installation activities at all jetties. An observer must meet the qualifications stated in the application, have prior training and experience conducting marine mammal monitoring or surveys, and have the ability to identify marine mammal species and describe relevant behaviors that may occur in proximity to in-water construction activities.
- MMOs must be approved in advanced by NMFS.
- Trained MMOs will be placed at the best vantage points practicable (*e.g.*, at the pile location on construction barges, on shore, or aboard vessels, *etc.* as noted in the figures) to monitor for marine mammals and implement shutdown/delay procedures when applicable by calling for the shutdown to the hammer operator. Likely shore-based MMO locations are described in section 16 of the Application.
- During pedestrian surveys, personnel will avoid as much as possible direct approach towards pinnipeds that are hauled out. If it is absolutely necessary to make movements towards pinnipeds, approach in a slow and steady manner to reduce the behavioral harassment to the animals as much as possible.
- Use a hand-held or boat-mounted GPS device *and* rangefinder to verify the required monitoring distance from the project site. MMOs will use range finders to determine distance to marine mammals, boats, buoys, and construction equipment.
- MMOs will be equipped with camera and video capable of recording any necessary take information, including data required in the event of an unauthorized Level A take.
- Scan the waters within the area of potential sound effects using high-quality binoculars (*e.g.*, Zeiss 10x42, or similar) or spotting scopes (20–60 zoom or equivalent), and by making visual observations.
- MMOs shall be equipped with radios or cell phones for maintaining immediate contact with other observers, Corps engineers, and personnel operating pile equipment.
- Monitoring would be conducted before, during, and after pile driving and removal activities. In addition, observers shall record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from piles being driven. Observations made outside the shutdown zone will not result in shutdown; that pile segment would be completed without cessation, unless the animal approaches or enters the shutdown zone, at which point all pile driving activities would be halted. Monitoring will take place from 30 minutes prior to initiation through 30 minutes post-completion of pile driving activities. Pile driving activities include the time to remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

3. Hydroacoustic Monitoring

A hydroacoustic monitoring plan shall be employed using an appropriate method reviewed and approved by NMFS to ensure that the harassment isopleths are not extending past the initial distances established.

Data Collection

We require that observers use approved data forms. Among other pieces of information, the Corps will record detailed information about any implementation of shutdowns, including the distance of animals to the pile and description of specific actions that ensued and resulting behavior of the animal, if any. In addition, the Corps will attempt to distinguish between the number of individual animals taken and the number of incidents of take. We require that, at a minimum, the following information be collected on the sighting forms:

- Date and time that monitored activity begins or ends;
- Construction activities occurring during each observation period;
- Weather parameters (*e.g.*, percent cover, visibility);
- Water conditions (*e.g.*, sea state, tide state);
- Species, numbers, and, if possible, sex and age class of marine mammals;
- Description of any observable marine mammal behavior patterns,

including bearing and direction of travel and distance from pile driving activity;

- Distance from pile driving activities to marine mammals and distance from the marine mammals to the observation point;
- Locations of all marine mammal observations; and
- Other human activity in the area.

Proposed Reporting Measures

The Corps would submit an annual report to NMFS's Permits and Conservation Division within 90 days of the end of every operating season (October 1) during the five-year authorization period. The annual report would detail the monitoring protocol, summarize the data recorded during monitoring, and estimate the number of marine mammals that may have been harassed. If no comments are received from NMFS within 30 days, the draft final report will become final. If comments are received, a final report must be submitted up to 30 days after receipt of comments. Reports shall contain the following information:

- Summaries of monitoring effort (*e.g.,* total hours, total distances, and marine mammal distribution through the study period, accounting for sea state and other factors affecting visibility and detectability of marine mammals);
- Analyses of the effects of various factors influencing detectability of marine mammals (*e.g.,* sea state, number of observers, and fog/glare);
- Species composition, occurrence, and distribution of marine mammal sightings, including date, numbers, age/size/gender categories (if determinable), and group sizes;
- Observed behavioral responses to pile driving including bearing and direction of travel and distance from pile driving activity; and
- Results of hydroacoustic monitoring program.

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by the LOA (if issued), such as an injury (Level A harassment), serious injury or mortality (*e.g.,* ship-strike, gear interaction, and/or entanglement), the Corps would immediately cease the specified activities and immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator. The report would include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Name and type of vessel involved (if applicable);
- Vessel's speed during and leading up to the incident (if applicable);
- Description of the incident;
- Status of all sound source used in the 24 hours preceding the incident;
- Water depth;
- Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities would not resume until NMFS is able to review the circumstances of the prohibited take. NMFS would work with the Corps to determine necessary actions to minimize the likelihood of further prohibited take and ensure MMPA compliance. The Corps would not be able to resume their activities until notified by NMFS via letter, email, or telephone.

In the event that the Corps discovers an injured or dead marine mammal, and the lead MMO determines that the cause of the injury or death is unknown and the death is relatively recent (*i.e.,* in less than a moderate state of decomposition as described in the next paragraph), the Corps would immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator.

The report would include the same information identified in the section above. Activities would be able to continue while NMFS reviews the circumstances of the incident. NMFS would work with the Corps to determine whether modifications in the activities are appropriate.

In the event that the Corps discovers an injured or dead marine mammal, and the lead MMO determines that the injury or death is not associated with or related to the activities authorized in the LOA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the Corps would report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the NMFS West Coast Stranding Hotline or West Coast Regional Stranding Coordinator, within 24 hours of the discovery. The Corps would provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. Pile driving activities would be permitted to continue.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines "harassment" as: ". . . any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment]."

All anticipated takes would be by Level B harassment resulting from vibratory pile driving and removal and may result in temporary changes in behavior. Injurious or lethal takes are not expected due to the expected source levels and sound source characteristics associated with the activity, and the proposed mitigation and monitoring measures are expected to further minimize the possibility of such take.

If a marine mammal responds to a stimulus by changing its behavior (*e.g.,* through relatively minor changes in locomotion direction/speed or vocalization behavior), the response may or may not constitute taking at the individual level, and is unlikely to affect the stock or the species as a whole. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on animals or on the stock or species could potentially be significant (*e.g.,* Lusseau and Bejder 2007; Weilgart 2007). Given the many uncertainties in predicting the quantity and types of impacts of sound on marine mammals, it is common practice to estimate how many animals are likely to be present within a particular distance of a given activity, or exposed to a particular level of sound, and to use those values to estimate take.

Upland work can generate airborne sound and create visual disturbance that could potentially result in disturbance to marine mammals (specifically, pinnipeds) that are hauled out or at the water's surface with heads above the water. Because there are regular haul-outs in close proximity to South Jetty, we believe that incidents of incidental take may occur. Furthermore, the Corps will also be conducting pedestrian surveys on each of the jetties during the summer lasting about two days for each survey. During the life of this proposed action, about six days of surveys over three seasons would occur at the South Jetty, which is the only jetty survey with the potential to impact pinnipeds.

The Corps requested authorization for the incidental taking of small numbers of killer whale, gray whale, humpback whale, harbor porpoise, Steller sea lion, California sea lion, and harbor seal near the MCR project area that may result from vibratory pile driving and removal during construction activities associated with the rehabilitation of the Jetty system at the MCR. In order to estimate the potential incidents of take that may occur incidental to the specified activity, we must first estimate the extent of the sound field that may be produced by the activity and then consider that in combination with information about marine mammal density or abundance in the project area. We first provide information on applicable sound thresholds for determining effects to marine mammals before describing the information used in estimating the sound fields, the available marine mammal density or abundance information, and the method of estimating potential incidences of take.

Sound Thresholds

We use generic sound exposure thresholds to determine when an activity that produces sound might result in impacts to a marine mammal such that a take by harassment might occur. These thresholds below (Table 3) are used to estimate when harassment may occur (*i.e.,* when an animal is exposed to levels equal to or exceeding the relevant criterion). NMFS is working to revise these acoustic guidelines; for more information on that process, please visit *www.nmfs.noaa.gov/pr/acoustics/guidelines.htm.*

TABLE 3—UNDERWATER INJURY AND DISTURBANCE THRESHOLD DECIBEL LEVELS FOR MARINE MAMMALS

Criterion	Criterion definition	Threshold*
Level A harassment	PTS (injury) conservatively based on TTS**	190 dB RMS for pinnipeds 180 dB RMS for cetaceans.
Level B harassment	Behavioral disruption for impulse noise (*e.g.,* impact pile driving).	160 dB RMS.
Level B harassment	Behavioral disruption for non-pulse noise (*e.g.,* vibratory pile driving, drilling).	120 dB RMS.

* All decibel levels referenced to 1 micropascal (re: 1 µPa). Note all thresholds are based off root mean square (RMS) levels.
** PTS = Permanent Threshold Shift; TTS = Temporary Threshold Shift.

Distance to Sound Thresholds

Underwater Sound Propagation Formula—Pile driving generates underwater noise that can potentially result in disturbance to marine mammals in the project area. Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

$TL = B * \log_{10} (R_1/R_2)$, where
TL = transmission loss in dB
B = wave mode coefficient
R_1= the distance of the modeled SPL from the driven pile, and
R_2= the distance from the driven pile of the initial measurement.

This formula neglects loss due to scattering and absorption, which is assumed to be zero here. The degree to which underwater sound propagates away from a sound source is dependent on a variety of factors, most notably the water bathymetry and presence or absence of reflective or absorptive conditions including in-water structures and sediments. Spherical spreading occurs in a perfectly unobstructed (free-field) environment not limited by depth or water surface, resulting in a 6 dB reduction in sound level for each doubling of distance from the source (20*log[range]). Cylindrical spreading occurs in an environment in which sound propagation is bounded by the water surface and sea bottom, resulting in a reduction of 3 dB in sound level for each doubling of distance from the source (10*log[range]). A practical spreading value of fifteen is often used under conditions where water increases with depth as the receiver moves away from the shoreline, resulting in an expected propagation environment that would lie between spherical and cylindrical spreading loss conditions. Practical spreading loss ((15*log[range]) with a 4.5 dB reduction in sound level for each doubling of distance is assumed here.

The Corps does not have information or modeling results related to pile installation activities. However, some features of the proposed action are similar to those recently proposed by the Navy, the Washington State Department of Transportation (WSDOT), and other entities which were issued IHA/LOAs. For these reasons, NMFS considered some of the results from previous, representative monitoring efforts. Though the MCR navigation channel is a major commercial thoroughfare, there are no ports or piers in the immediate proximity of the jetties, as the seas are too dangerous. The locations and settings of the MCR jetties are far more dynamic than a naval pier setting in the Puget Sound, the substrate is mostly sand, and the natural background noise is likely to be much higher with the large, breaking wave sets, dynamic currents, and high winds. The Corps project is also in the immediate proximity of the open ocean, with less opportunity for sound attenuation by land.

NMFS considered representative results from underwater monitoring for concrete, steel, and wood piles that were installed via both impact and vibratory hammers in water depths from 5 to 15 meters (Illingworth and Rodkin 2007, WSDOT 2011 cited in Naval Base Kitsap 2014, Navy 2014, and NMFS 2011b). Transmission loss and propagation estimates are affected by the size and depth of the piles, the type of hammer and installation method, frequency, temperature, sea conditions, currents, source and receiver depth, water depth, water chemistry, and bottom composition and topography. NMFS reviewed several documents that included relevant monitoring results for radial distances and proxy sound levels encompassed by underwater pile driving noise. These distances for vibratory driving for 24-in steel piles were summarized previously in Table 16 in the Application.

Because no site-specific, in-water noise attenuation data is available, the practical spreading model described and used by NMFS was used to determine transmission loss and the distances at which impact and vibratory pile driving or removal source levels are expected to attenuate down to the pertinent acoustic thresholds. The underwater practical spreading model is provided below:

$$R_2 = R_1 * 10\char`^ ((dB_{at\ R1} - dB_{acoustic\ threshold})/15)$$

Where:

R_1 = distance of a known or measured sound level

R_2 = estimated distance required for sound to attenuate to a prescribed acoustic threshold

NMFS used representative sound levels from different studies to determine appropriate proxy sound levels and to model estimated distances until pertinent thresholds (R_1 and dB at R_1). Studies which met the following parameters were considered: Pile materials comprised of wood, concrete, and steel pipe piles; pile sizes from 24- to 30-inches diameter, and pile driver type of either vibratory and impact hammers. These types and sizes of piles were considered in order to evaluate a representative range of sound levels that may result from the proposed action. In some cases, becausee there was little or no data specific to 24-inch piles, NMFS analyzed 30-inch piles as the next larger pile size with available data. The Corps will include a maximum pile size of 24-inches as a constraint in its construction contracts, though it will consult with NMFS regarding the originally proposed size.

Results of the practical spreading model provided the distance of the radii that were used to establish a ZOI or area affected by the noise criteria. At the MCR, the channel is about 3 miles across between the South and North Jetty. These jetties, as well as Jetty A, could attenuate noise, but the flanking sides on two of the jetties are open ocean, and Jetty A is slightly further interior in the estuary. Clatsop Spit, Cape Disappointment, Hammond Point, as well as the Sand Islands, are also land features that would attenuate noise. Therefore, as a conservative estimate, NMFS is using (and showing on ZOI maps) the maximum distance and area but has indicated jetty attenuation in the ZOI area maps (See Figures 18, 19, 20, and 21 in the Application).

NMFS selected proxy values for impact installation methods and calculated distances to acoustic thresholds for comparison and contextual purposes. NMFS ultimately relied most heavily on the proxy values developed by the Navy (2014).

For vibratory pile driving source level installation, NMFS proposes to use a figure of 163 dB re 1 µPa rms at 10 m. The proxy value of 163 dB re 1 µPa rms at 10 m is greater than the 24-inch pipe pile proxy and equal to the sheet pile values proposed by Navy (2014) at 161 dB re 1 µPa rms and 163 dB re 1 µPa rms, respectively, and is also higher than the Friday Harbor Ferry sample (162 dB re 1 µPa rms) (Navy 2014 and Laughlin 2010a cited in Washington State Ferries 2013, respectively). NMFS also proposes 163 dB re 1 µPa rms to represent sheet pile installation, which registered higher than the pipe pile levels in the proxy study. Given the comparative differences between the substrate and context used in the Navy study relative to the MCR, 163 dB re 1 µPa rms is a very conservative evaluation level. Results are listed in Tables 4, 5, 6, and 7.

TABLE 4—CALCULATED AREA ENCOMPASSED WITHIN ZONE OF INFLUENCE AT MCR JETTIES FOR UNDERWATER MARINE MAMMAL SOUND THRESHOLDS AT JETTY A

Jetty	Underwater threshold	Distance—m (ft)	Area excluding land & jetty masses—km² (mi²)
Jetty A: ~ Station 78+50, River Side	Vibratory driving, pinniped injury (190 dB)	0	0
	Vibratory driving, cetacean injury (180 dB)	1 (3.3)	<0.000003 (0.000001)
	Vibratory driving, disturbance (120 dB)	7,356 (4.6 miles)	23.63 (9.12)

TABLE 5—CALCULATED AREA ENCOMPASSED WITHIN ZONE OF INFLUENCE AT MCR JETTIES FOR UNDERWATER MARINE MAMMAL SOUND THRESHOLDS AT NORTH JETTY: CHANNEL SIDE

Jetty	Underwater threshold	Distance—m (ft)	Area excluding land & jetty masses—km² (mi²)
North Jetty: ~ Station 70+00, Channel Side	Vibratory driving, pinniped injury (190 dB)	0	0
	Vibratory driving, cetacean injury (180 dB)	1 (3.3)	<0.000003 (0.000001)
	Vibratory driving, disturbance (120 dB)	7,356 (4.6 miles)	49.18 (18.99)

TABLE 6—CALCULATED AREA ENCOMPASSED WITHIN ZONE OF INFLUENCE AT MCR JETTIES FOR UNDERWATER MARINE MAMMAL SOUND THRESHOLDS AT SOUTH JETTY: CLATSOP SPIT SITE

Jetty	Underwater threshold	Distance—m (ft)	Area excluding land & jetty masses—km² (mi²)
South Jetty: ~ Clatsop Spit Side	Vibratory driving, pinniped injury (190 dB)	0	0
	Vibratory driving, cetacean injury (180 dB)	1 (3.3)	<0.000003 (0.000001)
	Vibratory driving, disturbance (120 dB)	7,356 (4.6 miles)	51.96 (20.06)

TABLE 7—CALCULATED AREA ENCOMPASSED WITHIN ZONE OF INFLUENCE AT MCR JETTIES FOR UNDERWATER MARINE MAMMAL SOUND THRESHOLDS AT SOUTH JETTY: STATION 270+00 CHANNEL SIDE

Jetty	Underwater threshold	Distance—m (ft)	Area excluding land & jetty masses—km^2 (mi^2)
South Jetty: ~ Channel Side	Vibratory driving, pinniped injury (190 dB)	0	0
	Vibratory driving, cetacean injury (180 dB)	1 (3.3)	<0.000003 (0.000001)
	Vibratory driving, disturbance (120 dB)	7,356 (4.6 miles)	52.89 (20.42)

Note that the actual area ensonified by pile driving activities is significantly constrained by local topography relative to the total threshold radius. The actual ensonified area was determined using a straight line-of-sight projection from the anticipated pile driving locations. These areas are depicted in Figures 18, 19, 20 and 21 in the Application.

Airborne construction sound may also cause behavioral responses. Again, the Corps does not have specific, in-situ data and has used monitoring results from similar actions to obtain representative proxy SPLs. This also included the Navy (2014) proxy study for acoustic values from both vibratory and impact installation methods.

During the Navy study (2014), a maximum level of 110 re 20 μPa at 15 m was measured for a single 24-inch pile installed via impact hammer and was selected as the most representative value for modeling analysis under the Navy proxy study. The site was located in the Puget Sound. A single 30-second measurement was made for 24-inch piles during the Test Pile Program at NBK, Bangor via vibratory installation, and because these data fit the overall trend of smaller and larger pile sizes, the limited data set for 24-inch steel pipe supported the Navy (2014) representative proxy value of 92 dB re 20 μPa at 15 m (Navy 2014) for vibratory installation. The rms L_{eq} value for 24-inch steel pipe piles was also chosen as the best estimate for 24-inch sheet piles in the Navy study (Navy 2014).

The method used for calculating potential exposures to vibratory pile driving noise for each threshold was estimated using local marine mammal data sets, the Biological Opinion and data from LOA/IHA estimates on similar projects with similar actions. All estimates are conservative and include the following assumptions:

- During construction, each species could be present in the project area each day. The potential for a take is based on a 24-hour period. The model assumes that there can be one potential take (Level B harassment exposure) per individual per 24-hours;
- All pilings installed at each site would have an underwater noise disturbance equal to the piling that causes the greatest noise disturbance (*i.e.*, the piling furthest from shore) installed with the method that has the largest ZOI. The largest underwater disturbance ZOI would be produced by vibratory driving steel piles. The ZOIs for each threshold are not spherical and are truncated by land masses which would dissipate sound pressure waves;
- Exposures were based on estimated work days. Construction at each of the three offloading facilities would occur over an approximate span of ~17 days per facility resulting in 51 days. Assuming that not all of the Jetty A work was completed prior to the expiration of the IHA, seven days were added to cover remaining work at that location. Additionally six days of pedestrian surveys are planned to occur on South Jetty which may result in pinniped disturbance at haulout sites; and
- In absence of site specific underwater acoustic propagation modeling, the practical spreading loss model was used to determine the ZOI.

The exposure estimates for cetaceans were generated using the following general equation. Note that additional details are provided below for each species for which authorized take is proposed:

Exposure estimate = (n * ZOI) * days of total activity over 5 years

Where:

n = density estimate used for each species/season

ZOI = sound threshold ZOI area; the area encompassed by all locations where the SPLs equal or exceed the threshold being evaluated as shown in Tables 4, 5, 6, and 7.

n * ZOI produces an estimate of the abundance of animals that could be present in the area for exposure, and is multiplied by days of total activity.

Exposure estimates for pinnipeds were generated using haulout data collected by state wildlife agencies depicting the numbers of various pinniped species that are hauled out near the tip of the South Jetty.

Note that pinnipeds that occur near the project sites could be exposed to airborne sounds associated with pile driving that have the potential to cause behavioral harassment, depending on their distance from pile driving activities. Cetaceans are not expected to be exposed to airborne sounds that would result in harassment as defined under the MMPA. Airborne noise will primarily be an issue for pinnipeds that are swimming or hauled out near the project site within the range of noise levels elevated above the airborne acoustic criteria. NMFS recognizes that pinnipeds in the water could be exposed to airborne sound that may result in behavioral harassment when looking with heads above water. However, these animals would previously have been taken as a result of exposure to underwater sound above the behavioral harassment thresholds, which are in all cases larger than those associated with airborne sound. Thus, the behavioral harassment of these animals is already accounted for in these estimates of potential take. Multiple incidents of exposure to sound above NMFS' thresholds for behavioral harassment are not believed to result in increased behavioral disturbance, in either nature or intensity of disturbance reaction. Therefore, we do not believe that authorization of incidental take resulting from airborne sound for pinnipeds is warranted, and airborne sound is not discussed further here.

Killer Whale

Southern Resident killer whales have been observed offshore near the study area and ZOI, but the Corps does not have fine-scale details on frequency of use. While killer whales do occur in the Columbia River plume, where fresh water from the river intermixes with salt water from the ocean, they are rarely seen in the interior of the Columbia River Jetty system. Because Southern Residents have been known to feed in the area offshore, the Corps has limited its pile installation window in order to avoid peak salmon runs and any overlap with the presence of Southern Residents. To ensure no Level B acoustical harassment of endangered Southern Resident killer whales occurs, the Corps will prohibit pile installation from October 1 until April 30 of each season. The Corps is proposing to include vessel surveys and to implement a shut-down procedure if killer whales occur in the ZOI during pile installation/removal/repair activities from May 1 to July 1 to avoid take. After July 1, any animals taken are assumed to be transient killer whales. As such NMFS is not anticipating any acoustic exposure to Southern Residents. Therefore, NMFS has determined that authorization of take for Southern Residents is not warranted.

Western transient killer whales may be traversing offshore over a greater duration of time than the feeding resident. They are rarely observed inside of the jetty system. The Pacific U.S. Navy Marine Species Density Database (Hanser *et al.,* 2014) provides an estimated density of 0.00055–0.00411 animals per km² for killer whales in spring, summer and fall for offshore areas near MCR. Only North Jetty and South Jetty were included as part of this calculation because the ensonified zones associated with driving at the two locations extends out into the open ocean where killer whales may occur. The ensonified zones associated with Jetty A and Clatsop Spit are located to the inland side of the Jetty system where killer whales are unlikely to be found.

The following formula was used to calculate exposure:

$$\begin{aligned}
&\text{Exposure Estimate}\\
&= (0.00411_{\text{DensityEstimate}}\\
&\quad * 48.18_{\text{ZOI North Jetty}}\\
&\quad * 17_{\text{days}}) + (0.00411_{\text{DensityEstimate}}\\
&\quad * 52.89_{\text{ZOI South Jetty}} * 17_{\text{days}})\\
&= 7.05 \text{ whales}
\end{aligned}$$

Where:

$N_{\text{DensityEstimate}}$ = Estimated density of species within the 7.35 km (4.6 mi) radii encompassing the ZOIs at the North Jetty (48.18 km²) and South Jetty (52.89 km²) using the U.S. Navy density model (2014)

Days = Total days of pile installation or removal activity (17 days/facility * North and South Jetty offloading facilities = 34 days)

While the calculated exposure is 7.05 whales, NMFS believes that an authorized take of 20 over the 5 year LOA period is warranted because solitary killer whales are rarely observed, and transient whales travel in pods of 6 or less (Dalheim *et al.,* 2008) members. NMFS has conservatively assumed that 4 pods of 5 killer whales will exposed to Level B harassment.

Humpback Whale

The Corps does not have fine-scale information about humpback whale use within the immediate project area. The Navy (2014) marine mammal database indicates that between 0.002 animals per km² occur near the mouth of the Columbia River during spring (March–May) while the summer (June–August) and fall (September–November) densities are 0.0214 animals per km². Most of the pile installation is likely to be done in May or June at the beginning of the construction season while pile removal would occur towards the end of the season in August and September. Repair or replacement of piles, although not anticipated, could occur anytime during the five month construction season. Therefore, NMFS will conservatively assume that approximately 20 percent of driving will occur during each month between May and September, which equates to 3.4 days per month. Rounding to full days, NMFS will assume that 3 days of driving per month will occur from June through August while 4 days of driving will occur in the months of May and September. Humpback whales will only occur in the offshore portions of the project area which would be the ensonified areas associated with driving activities at the North and South Jetties.

The following formula was used to calculate exposure:

$$\begin{aligned}
&\text{Exposure Estimate} = (0.002_{\text{DensityEstimate}}\\
&\quad * 48.18_{\text{ZOI North Jetty}} * 4_{\text{days (May)}}\\
&\quad + 0.0214_{\text{DensityEstimate}}\\
&\quad * 48.18_{\text{ZOI North Jetty}}\\
&\quad * 13_{\text{days (June–September)}})\\
&\quad + (0.002_{\text{DensityEstimate}}\\
&\quad * 52.89_{\text{ZOI South Jetty}} * 4_{\text{days (May)}}\\
&\quad + 0.0214_{\text{DensityEstimate}}\\
&\quad * 52.89_{\text{ZOI South Jetty}}\\
&\quad * 13_{\text{days (June–September)}})\\
&\quad = 28.9 \text{ humpback whale exposures.}
\end{aligned}$$

Based on the above formula, an estimate of 29 (28.9) humpback whale disturbance exposures was calculated over the duration of the entire project. Therefore, NMFS is recommending Level B take of 29 humpback whales.

Gray Whales

Anecdotal evidence also indicates gray whales have been seen at MCR but are not a common visitor, as they mostly remain in the vicinity of the further offshore shelf-break (Griffith 2015). According to NOAA's Cetacean Mapping classification the waters in the vicinity of the MCR are classified as a Biologically Important Area (BIA) for gray whales. These whales use the area as a migration corridor (Calambokidis *et al.,* 2015). As primarily bottom feeders, gray whales are the most coastal of all great whales. They primarily feed in shallow continental shelf waters and are often observed within a few miles of shore (Barlow *et. al.,* 2009). The Pacific Coast Feeding Group (PCFG) or northbound summer migrants would be the most likely gray whales to be in the vicinity of MCR.

The Navy (2014) marine mammal database indicates that between 0.0487 animals per km² occur near the mouth of the Columbia River during spring (March–May) while the summer (June–August) and fall (September–November) densities are 0.00045 animals per km². NMFS will conservatively assume that approximately 20 percent of driving will occur during each month between May and September which equates to 3.4 days per month. Rounding to full days NMFS will assume that three days of drilling per month will occur from June through August while four days of drilling will occur in the months of May and September. Gray whales would only occur in the offshore portions of the project area associated with pile driving activities at the North and South Jetties.

The following formula was used to calculate exposure:

$$\begin{aligned}
&\text{Exposure Estimate} =\\
&\quad +(0.0487_{\text{DensityEstimate}}\\
&\quad * 48.18_{\text{ZOI North Jetty}} * 4_{\text{days (May)}}\\
&\quad + 0.00045_{\text{DensityEstimate}}\\
&\quad * 48.18_{\text{ZOI North Jetty}}\\
&\quad * 13_{\text{days (June–September)}})\\
&\quad + (0.0487_{\text{DensityEstimate}}\\
&\quad * 52.89_{\text{ZOI South Jetty}} * 4_{\text{days (May)}}\\
&\quad + 0.00045_{\text{DensityEstimate}}\\
&\quad * 52.89_{\text{ZOI South Jetty}}\\
&\quad * 13_{\text{days (June–September)}})\\
&\quad = 20.27 \text{ gray whale exposures.}
\end{aligned}$$

However, the number of gray whale exposures at the North Jetty and South Jetty locations should be higher than that of humpback whales because gray whales are known to inhabit nearshore environments in greater numbers than humpback whales.

Gray whales typically migrate in pods numbering between 1 and 3 although migrating pods of 16 or more have been recorded (Jefferson *et al.,* 1993.) For gray whales, NMFS will conservatively assume 20 pods of 2 gray whales will be exposed for work done at the North Jetty and South Jetty sites. Therefore, the total number of proposed takes is 40 gray whales.

Harbor Porpoise

Harbor porpoises are known to occupy shallow, coastal waters and, therefore, are likely to be found in the vicinity of the MCR. They are also known to occur within the proposed project area (Griffith 2015).

The Navy (2014) provides an estimated year round density of 1.67163 animals per km² for offshore waters near the MCR. This number will be utilized to estimate take for all four jetties as porpoises are known to occur on the inland side of the jetty complex.

The formula used for harbor porpoises is below:

$$\begin{aligned}\text{Exposure Estimate} =\ & (1.67163_{\text{DensityEstimate}} * 23.63_{\text{ZOI Jetty A}} * 7_{\text{days}}) \\ & + (1.67163_{\text{DensityEstimate}} * 48.18_{\text{ZOI North Jetty}} * 17_{\text{days}}) \\ & + (1.67163_{\text{DensityEstimate}} * 52.89_{\text{ZOI South Jetty Channel}} * 17_{\text{days}}) \\ & + (1.67163_{\text{DensityEstimate}} * 51.96_{\text{ZOI South Jetty Clatsop}} * 17_{\text{days}}) \\ & = 4{,}624 \text{ harbor porpoise exposures.}\end{aligned}$$

Based on the density model suggested by NOAA (2015), the Corps has provided a very conservative maximum estimate of 4,624 harbor porpoise disturbance exposures over the 58 days of operation. However, this number of potential exposures does not accurately reflect the actual number of animals that would potentially be taken for the MCR jetty project. Rather, it is more likely that the same animal may be exposed more than once during each 17-day operating window. According to Halpin *et al.* (2009), the normal range of group size generally consists of less than five or six individuals, although aggregations into large, loose groups of 50 to several hundred animals could occur for feeding or migration. Because the ZOI only extends for a maximum 7.35 km (4.6 mi), it is likely that due to competition and territorial circumstances only a limited number of pods would be feeding in the ZOI at any particular time, and members of this small number of pods could be taken repeatedly. NMFS is recommending Level B take of 4,624 harbor porpoises.

Pinnipeds

There are haulout sites on the South Jetty used by pinnipeds, especially Steller sea lions. It is likely that pinnipeds that use the haulout area would be exposed to 120 dB threshold acoustic threshold during pile driving activities. The number of exposures would vary based on weather conditions, season, and daily fluctuations in abundance. Based on a survey by the WDFW (2014), the number of affected Steller sea lions could be between 200–800 animals per day depending on the particular month. California sea lion numbers could range from 1 to 500 per day and the number of harbor seals could be as low as 1 to as high as 57 per day. Exposure and take estimates, below, are based on past pinniped data from WDFW (2000–2014 data), which had a more robust monthly sampling frequency relative to ODFW (2014) counts. The exception to this was for harbor seal counts, for which ODFW (also 2000–2014 data) had more sampling data in certain months. Therefore, ODFW harbor seal data was used for the month of May, which indicated zero harbor seal sightings in May. NMFS utilized the average of counts from May through September from surveys conducted in between 2000 and 2014 at the South Jetty. This survey data was used to calculate take of animals exposed to Level B disturbance at the South Jetty's pinniped haulout area. NMFS will conservatively assume that all pinnipeds both hauled out and in-water would enter the water at some point during a single day of driving and transit into one of the four ensonified zones associated with each offloading facility. Therefore, they would be exposed to noise at or above the Level B thresholds.

To calculate take, NMFS will take the average daily counts from the months of May and June, when pile driving is likely to occur. This will be multiplied by the total number of days of driving (58) at the four offloading facilities.

$$\begin{aligned}\text{Exposure Estimate}_{\text{Stellar}} =\ & (N_{\text{est(May–Sept)}} * 58_{\text{underwater/piles days}}) \\ & = 27{,}773 \text{ Steller sea lions}\end{aligned}$$

$$\begin{aligned}\text{Exposure Estimate}_{\text{California}} \\ & = (N_{\text{est(May–Sept)}} * 58_{\text{underwater/piles days}}) \\ & = 8{,}039 \text{ California sea lions}\end{aligned}$$

$$\begin{aligned}\text{Exposure Estimate}_{\text{Harbor}} =\ & (N_{\text{est(May–Sept)}} * 58_{\text{underwater/piles days}}) \\ & = 989 \text{ Harbor porpoises}\end{aligned}$$

Where:

N_{est} = Estimated daily average number of animals for May and June hauled out at South Jetty based on WDFW data and ODFW data

Duration = total days of pile installation or removal activity for underwater thresholds (58); 17 days each at North Jetty, South Jetty, and Clatsop Spit and 7 days remaining at Jetty A.

In order to estimate exposure from pedestrian surveys, NMFS assumed that over the span of three survey seasons (6 days), there was a chance of visual disturbance impacting one percent of pinnipeds that may be hauled out on the jetty during any single day. Because survey days are weather dependent and occur in the summer time, the Corps conservatively selected from the highest monthly average species number during the summer months between May and August. Pinniped exposure estimates are found in Table 8.

TABLE 8—AUTHORIZED TAKES OF PINNIPEDS DURING PILE INSTALLATION AT JETTY A, NORTH JETTY, SOUTH JETTY, AND CLATSOP SPIT

Month	Steller sea lion	California sea lion	Harbor seal
	Avg [1] #	Avg [1] #	Avg [1] [2] #
April	587	99	
May	824	125	0
June	676	202	57
July	358	1	10
August	324	115	1
September	209	249	
October	384	508	
Avg Daily Count (May–Sept) [3]	478	138	17
Total Pile Driving Exposures (58 days)	27,724	8,027	986
Pedestrian Survey Exposures—1% of highest monthly Avg.$_{\text{May–August}}$ (6 days)	49	12	3
Total Exposures	27,773	8,039	989

[1] WDFW average daily count per month from 2000–2014.

[2] ODFW average daily count per month for May and July 2000–2014 due to additional available sampling data.

[3] Conservatively assumes each exposure is to new individual, all individuals are new arrivals each month, and no individual is exposed more than one time.

Analyses and Determinations

Negligible Impact Analysis

Negligible impact is "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival" (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of Level B harassment takes, alone, is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be "taken" through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, migration, etc.), as well as the number and nature of estimated Level A harassment takes, the number of estimated mortalities, effects on habitat, and the status of the species.

To avoid repetition, the discussion of our analyses applies to all the species listed in Table 1, with the exception of Southern Resident killer whales and gray whales, given that the anticipated effects of this pile driving project on marine mammals are expected to be relatively similar in nature. There is no information about the size, status, or structure of any species or stock that would lead to a different analysis for this activity, else species-specific factors would be identified and analyzed.

Pile driving activities associated with the rehabilitation of the Jetty system at the MCR, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the planned activities may result in take, in the form of Level B harassment (behavioral disturbance) only, from underwater sounds generated from pile driving. Potential takes could occur if individuals of these species are present in the ensonified zone when pile driving is happening.

No injury, serious injury, or mortality is anticipated given the nature of the activity and measures designed to minimize the possibility of injury to marine mammals. The potential for these outcomes is minimized through the construction method and the implementation of the planned mitigation measures. Specifically, vibratory hammers will be the only method of installation utilized. No impact driving is planned. Vibratory driving does not have significant potential to cause injury to marine mammals due to the relatively low source levels produced and the lack of potentially injurious source characteristics. The likelihood of marine mammal detection ability by both land-based and vessel-based observers is high under the environmental conditions described for the rehabilitation of the Jetty system. MMO's ability to readily implement shutdowns as necessary during Jetty system construction activities will result in avoidance of injury, serious injury, or mortality.

The Corps' proposed pile driving activities are localized and of short duration. The entire project area is limited to the four jetty offloading facilities and their immediate surroundings. Pile driving activities covered under the LOA would take on approximately 10 hours per day for 58 days over a five year period. Six days of pedestrian surveys across the five year period are also planned. The piles would be a maximum diameter of 24 inches and would only be installed by vibratory driving method. The possibility exists that smaller diameter piles may be used, but for this analysis it is assumed that 24-inch piles will be driven.

These localized and short-term noise exposures may cause brief startle reactions or short-term behavioral modification by the animals. These reactions and behavioral changes are expected to subside quickly when the exposures cease. Moreover, the proposed mitigation and monitoring measures are expected to reduce potential exposures and behavioral modifications even further. Additionally, no important feeding and/or reproductive areas for marine mammals are known to be near the proposed action areas. Therefore, the take resulting from the proposed project is not reasonably expected to and is not reasonably likely to adversely affect the marine mammal species or stocks through effects on annual rates of recruitment or survival.

The project also is not expected to have significant adverse effects on affected marine mammals' habitat, as analyzed in detail in the "Anticipated Effects on Marine Mammal Habitat" section. The project activities would not modify existing marine mammal habitat. The activities may cause some fish to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range; but, because of the short duration of the activities and the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (*e.g.*, Thorson and Reyff, 2006; Lerma, 2014). Most likely, individuals will simply move away from the sound source and be temporarily displaced from the areas of pile driving, although even this reaction has been observed primarily only in association with impact pile driving. In response to vibratory driving, pinnipeds (which may become somewhat habituated to human activity in industrial or urban waterways) have been observed to orient towards and sometimes move towards the sound. The pile driving activities analyzed here are similar to, or less impactful than, numerous construction activities conducted in other similar locations, which have taken place with no reported injuries or mortality to marine mammals, and no known long-term adverse consequences from behavioral harassment. Repeated exposures of individuals to levels of sound that may cause Level B harassment are unlikely to result in hearing impairment or to significantly disrupt foraging behavior. Thus, even repeated Level B harassment of some small subset of the overall stocks is unlikely to result in any significant realized decrease in fitness for the affected individuals, and thus would not result in any adverse impact to the stock as a whole. Level B harassment will be reduced to the level of least practicable impact through use of mitigation measures described herein and, if sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the project area while the activity is occurring.

Note that NMFS has not authorized take for the endangered Southern Resident killer whales. Take has not been authorized because the Corps will prohibit pile driving from October 1 through May 1 which is considered the primary feeding season for Southern Residents and when their presence in the project areas is likely to be greatest. Additionally, the Corps will shut down all pile driving activities between May 1 and July 1 if any killer whale is observed approaching the ZOI. While unlikely, Southern Residents may occur near the project areas during this time. Because it may be difficult to differentiate between Southern Resident and transient populations, this conservative measure will ensure that no Southern Residents are taken. After July 1 it would be highly unlikely for Southern Residents to occur in the project areas. Therefore, shut down for Southern Residents will not be necessary, and any killer whales observed in the ZOI during this time are assumed to be transient killer whales.

The area offshore of MCR has been identified as a BIA for migrating gray whales (Calambokidis *et al.*, 2015). Members of the PCFG as well as other animals from both the eastern and western North Pacific populations travel through the area. However, this region has not been identified as one of six distinct PCFG feeding BIAs where PCFG animals are likely to stay for extended periods. Furthermore, anecdotal evidence indicates that while members of the PCFG have been observed near the MCR, they are not a common visitor, as they mostly remain in the vicinity of the offshore shelf-break Griffith (2015).

In summary, this negligible impact analysis is founded on the following factors: (1) The possibility of injury, serious injury, or mortality may reasonably be considered discountable; (2) the anticipated incidents of Level B harassment consist of, at worst, temporary modifications in behavior and; (3) the presumed efficacy of the proposed mitigation measures in reducing the effects of the specified activity to the level of least practicable impact. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activity will have only short-term effects on individuals. The specified activity is not expected to impact rates of recruitment or survival and will therefore not result in population-level impacts.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS finds that the total marine mammal take from the Corps' rehabilitation of the MCR Jetty System will have a negligible impact on the affected marine mammal species or stocks.

TABLE 9—ESTIMATED PERCENTAGE OF SPECIES/STOCKS THAT MAY BE EXPOSED TO LEVEL B HARASSMENT

Species	Total proposed authorized takes over 5 years/average annual take (rounded)	Abundance	Percentage of total stock taken annually over 5 year LOA period
Killer whale (Western transient stock)	20/4	243	1.6
Humpback whale (California/Oregon/Washington stock)	29/6	1,918	0.3
Gray whale (Eastern North Pacific Stock)	40/8	18,017	<0.01
Harbor porpoise	4,624/924	21,487	4.3
Steller sea lion	27,773/5,555	63,160–78,198	8.8–7.1
California sea lion	8,039/1,608	296,750	0.5
Harbor seal	989/198	24,732	0.8

Small Numbers Analysis

Table 9 illustrates the number of animals that could be exposed to received noise levels that could cause Level B behavioral harassment for the proposed work associated with the rehabilitation of the Jetty system at MCR. The total number of allowed takes was estimated and then divided equally over five years, which is the length of the proposed LOA. This was done because the small numbers analysis must be conducted on an annual basis.

Note that the work at the four jetty offloading facilities will not be spread evenly over the proposed five-year authorization period. Because the schedule for pile driving over the five year period is uncertain and susceptible to change depending on future funding availability, it is not possible for NMFS to estimate exposure and subsequent take for specific years. As such, the actual take per species may be higher or lower than the annual average for a specific year. Because the take numbers generated by NMFS are annualized averages, NMFS will assume that in any one year the actual take will be up to two times greater than the projected average annual take. As such, the greatest percentage of a total stock taken annually is not likely to exceed 17.6 percent (11,110 Steller sea lions). Furthermore, the small numbers analyses of annual averages shown in Table 9 represents between 8.8 percent and <0.01 percent of the populations of these stocks that could be affected by Level B behavioral harassment. The numbers of animals authorized to be taken for all species would be considered small relative to the relevant stocks or populations even if each estimated taking occurred to a new individual—an extremely unlikely scenario. For pinnipeds occurring in the vicinity of the offloading facilities, especially those hauled out at South Jetty, there will almost certainly be overlap in individuals present day-to-day, and these takes are likely to occur only within some small portion of the overall regional stock.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, which are expected to reduce the number of marine mammals potentially affected by the proposed action, NMFS finds that small numbers of marine mammals will be taken relative to the populations of the affected species or stocks.

Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no subsistence uses of marine mammals in the proposed project area and, thus, no subsistence uses impacted by this action.

Endangered Species Act (ESA)

We previously requested a section 7 consultation with NMFS West Coast Region for this action. The resultant Biological Opinion determined that the proposed action was not likely to jeopardize the continued existence of humpback whales. The West Coast Region has determined that the March 18, 2011, Biological Opinion remains valid and that the proposed MMPA authorization provides no new information about the effects of the action, nor does it change the extent of effects of the action, nor offers any other basis to require reinitiation of the consultation. Therefore, the March 18, 2011, Biological Opinion meets the requirements of section 7(a)(2) of the ESA and implementing regulations at 50 CFR part 402 for our proposed action to issue an LOA under the MMPA, and no further consultation is required. The West Coast Region will issue a new Incidental Take Statement and append it to the 2011 Biological Opinion.

National Environmental Policy Act (NEPA)

The Corps issued the *Final Environmental Assessment Columbia River at the Mouth, Oregon and Washington Rehabilitation of the Jetty System at the Mouth of the Columbia River* and *Finding of No Significant Impact* in 2011. The environmental assessment (EA) and finding of no significant interest (FONSI) were revised in 2012 with a FONSI being signed on July 26, 2012. NMFS has reviewed the Corps' application for a rehabilitation of the MCR Jetty system. Based on that review, we have determined that the proposed action closely follows the activities described in the EA and does not present any substantial changes, or significant new circumstances or information relevant to environmental concerns which would require a supplement to the 2012 EA or preparation of a new NEPA document. Therefore, we have preliminarily determined that a new or supplemental EA or Environmental Impact Statement is unnecessary, and will, after review of public comments, determine whether or not to rely on the existing EA and FONSI. The 2012 EA is available for review at *www.nmfs.noaa.gov/pr/permits/incidental/construction.htm.*

Classification

The Office of Management and Budget has determined that this proposed rule is not significant for purposes of Executive Order 12866.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The U.S. Army Corps of Engineers is the only entity that would be subject to the requirements in these proposed regulations. The RFA requires Federal agencies to prepare an analysis of a rule's impact on small entities whenever the agency is required to publish a notice of proposed rulemaking. However, a Federal agency may certify, pursuant to 5 U.S.C. 605(b), that the action will not have a significant economic impact on a substantial number of small entities. The U.S. Army Corps of Engineers is the only entity that would be subject to the requirements in these proposed regulations. The SBA defines a small entity as one that is independently owned and operated, and not dominant in its field of operation. The U.S. Army Corps of Engineers is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Any requirements imposed by a Letter of Authorization issued pursuant to these regulations, and any monitoring or reporting requirements imposed by these regulations, would be applicable only to the U.S. Army Corp of Engineers. NMFS does not expect the issuance of these regulations or the associated LOAs to result in any impacts to small entities pursuant to the RFA. Because this action, if adopted, would directly affect the U.S. Army Corps of Engineers and not a small entity, NMFS concludes the action would not result in a significant economic impact on a substantial number of small entities. Thus, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number.

This proposed rule contains collection-of-information requirements subject to the provisions of the PRA. These requirements have been approved by OMB under control number 0648–0151 and include applications for regulations, subsequent LOAs, and reports. Send comments regarding any aspect of this data collection, including suggestions for reducing the burden, to NMFS and the OMB Desk Officer (see **ADDRESSES**).

The Office of Management and Budget has determined that this proposed rule is not significant for purposes of Executive Order 12866. NMFS has considered all provisions of E.O. 12866 and analyzed this action's impact. Based on that review, this action is not expected to have an annual effect on the economy of $100 million or more, or have an adverse effect in a material way on the economy. Furthermore, this action would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; or materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel or policy issues.

List of Subjects in 50 CFR Part 217

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: August 16, 2016.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR part 217 is proposed to be amended as follows:

PART 217—REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

■ 2. Add subpart X to part 217 to read as follows:

Subpart X—Taking Marine Mammals Incidental to Rehabilitation of the Jetty System at the Mouth of the Columbia River in Oregon and Washington

Sec.

217.230 Specified activity and specified geographical region.
217.231 Effective dates.
217.232 Permissible methods of taking.
217.233 Prohibitions.
217.234 Mitigation requirements.
217.235 Requirements for monitoring and reporting.
217.236 Letters of Authorization.
217.237 Renewals and modifications of Letters of Authorization.

Subpart X Taking Marine Mammals Incidental to Rehabilitation of the Jetty System at the Mouth of the Columbia River in Oregon and Washington

§ 217.230 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the U.S. Army Corps of Engineers (Corps) and those persons it authorizes to conduct activities on its behalf for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occurs incidental to the jetty rehabilitation program.

(b) The taking of marine mammals by the Corps may be authorized in a Letter of Authorization (LOA) only if it occurs within the nearshored marine environment at the Mouth of the Columbia River in Oregon and Washington.

§ 217.231 Effective dates.

Regulations in this subpart are effective May 1, 2017 through April 30, 2022.

§ 217.232 Permissible methods of taking.

(a) Under LOAs issued pursuant to § 216.106 of this chapter and § 217.236, the Holder of the LOA (hereinafter "Corps") may incidentally, but not intentionally, take marine mammals within the area described in § 217.230(b), provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

(b) The incidental take of marine mammals under the activities identified in § 217.230(a) is limited to the indicated number of takes on an annual basis of the following species and is limited to Level B harassment:

(1) Cetaceans:

(i) Humpback whale (*Megaptera novaeangliae*)—29;

(ii) Harbor porpoise (*Phocoena phocoena*)—4,624;

(iii) Killer whale (*Orcinus orca*)—20;

(iv) Gray whale (*Eschrichtius robustus*)—40;

(2) Pinnipeds:

(i) Harbor seal (*Phoca vitulina*)—989;

(ii) Steller sea lion (*Eumetopias jubatus*)—27,773; and

(iii) California Sea Lion (*Zalophus californianus*)—8,039.

§ 217.233 Prohibitions.

(a) Notwithstanding takings contemplated in § 217.230 and authorized by an LOA issued under § 216.106 of this chapter and § 217.236, no person in connection with the activities described in § 217.230 may:

(1) Take any marine mammal not specified in § 217.232(b);

(2) Take any marine mammal specified in § 217.232(b) other than by incidental Level B harassment;

(3) Take a marine mammal specified in § 217.232(b) if the National Marine Fisheries Service (NMFS) determines such taking results in more than a negligible impact on the species or stocks of such marine mammal;

(4) Take a marine mammal specified in § 217.232(b) if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses; or

(5) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under § 216.106 of this chapter and § 217.236.

(b) [Reserved]

§ 217.234 Mitigation requirements.

(a) When conducting the activities identified in § 217.130(a), the mitigation measures contained in any LOA issued under § 216.106 of this chapter and § 217.236 must be implemented. These mitigation measures include, but are not limited to:

(1) General conditions:

(i) The Corps shall conduct briefings as necessary between vessel crews, marine mammal monitoring team, and other relevant personnel prior to the start of all pile driving and removal activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures;

(ii) Each Marine Mammal Observer (MMO) will maintain a copy of the LOA at their respective monitoring location, as well as a copy in the main construction office;

(iii) Pile activities are limited to the use of a vibratory hammer. Impact hammers are prohibited;

(iv) Pile installation/maintenance/removal activities are limited to the time frame starting May 1 and ending September 30 each season; and

(v) The Corps must notify NMFS' West Coast Regional Office (562–980–3232), at least 24-hours prior to start of activities impacting marine mammals.

(2) [Reserved]

(b) Establishment of Level B harassment zone:

(1) The Corps shall establish Level B behavioral harassment Zone of Influence (ZOI) where received underwater sound pressure levels (SPLs) are higher than 120 dB (rms) re 1 μPa for non-pulse sources (*i.e.* vibratory hammer). The ZOI delineates where Level B harassment would occur; and

(2) For vibratory driving, the level B harassment area is comprised of a radius between 65 ft (20 m) and 4.6 mi (7.35 km) from driving operations.

(c) Establishment of shutdown zone:

(1) The Corps shall implement a minimum shutdown zone of 65 ft (20 m) radial distance from vibratory hammer driving activities;

(2) For in-water heavy machinery work other than pile driving (using, *e.g.*, standard barges, tug boats, barge-mounted excavators, or clamshell equipment used to place or remove material), operations shall cease if a marine mammal comes within 66 ft (20 m) and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions;

(3) If a marine mammal approaches or enters the shutdown zone during the course of vibratory pile driving operations, the activity will be halted and delayed until the animal has voluntarily left and been visually confirmed beyond the shutdown zone;

(4) If a marine mammal is seen above water within or approaching a shutdown zone then dives below, the contractor would wait 15 minutes for pinnipeds and 30 minutes for cetaceans. If no marine mammals are seen by the observer in that time it will be assumed that the animal has moved beyond the exclusion zone;

(5) If the shutdown zone is obscured by fog or poor lighting conditions, pile driving shall not be initiated until the entire shutdown zone is visible;

(6) Disturbance zones shall be established as described in paragraph (b) of this section, and shall encompass the Level B harassment zones not defined as exclusion zones in paragraph (c) of this section. These zones shall be monitored to maximum line-of-sight distance from established vessel- and shore-based monitoring locations. If marine mammals other than those listed in § 217.232(b) are observed within the disturbance zone, the observation shall be recorded and communicated as necessary to other MMOs responsible for implementing shutdown/power down requirements and any behaviors documented;

(7) Between May 1 and July 1, the observation of any killer whales within the ZOI shall result in immediate shutdown all of pile installation, removal, or maintenance activities. Pile driving shall not resume until all killer whales have moved outside of the ZOI; and

(8) After July 1, no shutdown is required for Level B killer whale take, but animals must be recorded as Level B take in the monitoring forms described below.

(d) If the allowable number of takes for any marine mammal species in § 217.232(b) is exceeded, or if any marine mammal species not listed in § 217.232(b) is exposed to SPLs greater than or equal to 120 dB re 1 μPa (rms), the Corps shall immediately shutdown activities involving the use of active sound sources (*e.g.,* vibratory pile driving equipment), record the observation, and notify NMFS Office of Protected Resources.

§ 217.235 Requirements for monitoring and reporting.

(a) Monitoring.

(1) Qualified Marine Mammal Observers (MMOs) shall be used for both shore and vessel-based monitoring.

(2) All MMOs must be approved by NMFS.

(3) A qualified MMO is a third-party trained biologist with the following minimum qualifications:

(i) Visual acuity in both eyes (correction is permissible) sufficient to discern moving targets at the water's surface with ability to estimate target size and distance. Use of binoculars or spotting scope may be necessary to correctly identify the target;

(ii) Advanced education in biological science, wildlife management, mammalogy or related fields (Bachelor's degree or higher is preferred);

(iii) Experience and ability to conduct field observations and collect data according to assigned protocols (this may include academic experience);

(iv) Experience or training in the field identification of marine mammals (cetaceans and pinnipeds);

(v) Sufficient training, orientation or experience with vessel operation and pile driving operations to provide for personal safety during observations;

(vi) Writing skills sufficient to prepare a report of observations; and

(vii) Ability to communicate orally, by radio, or in-person with project personnel to provide real time information on marine mammals observed in the area, as needed.

(4) MMOs must be equipped with the following:

(i) Binoculars (10x42 or similar), laser rangefinder, GPS, big eye binoculars and/or spotting scope 20–60 zoom or equivalent; and

(ii) Camera and video capable of recording any necessary take information, including data required in the event of an unauthorized Level A take zone.

(5) MMOs shall conduct monitoring as follows:

(i) During all pile driving and removal activities;

(ii) Only during daylight hours from sunrise to sunset when it is possible to visually monitor mammals;

(iii) Scan the waters for 30 minutes before and during all pile driving. If any species for which take is not authorized are observed within the area of potential sound effects during or 30 minutes before pile driving, the MMO(s) will immediately notify the on-site supervisor or inspector, and require that pile driving either not initiate or temporarily cease until the animals have moved outside of the area of potential sound effects;

(iv) If weather or sea conditions restrict the observer's ability to observe, or become unsafe for the monitoring vessel(s) to operate, pile installation shall not begin or shall cease until conditions allow for monitoring to resume;

(v) Trained land-based observers will be placed at the best vantage points practicable. The observers position(s) will either be from the top of jetty or adjacent barge at the location of the pile activities and from Cape Disappointment Visitors Center during work at North and South Jetty, and Clatsop Spit for work at Jetty A;

(vi) Vessel-based monitoring for marine mammals must be conducted for all pile-driving activities at the North Jetty and two South Jetty offloading facilities. One or two vessels may be utilized as necessary to adequately monitor the offshore ensonified zone;

(vii) Any marine mammals listed in § 217.232(b) entering into the Level B harassment zone will be recorded as take by the MMO and listed on the appropriate monitoring forms described below;

(viii) During pedestrian surveys, personnel will avoid as much as possible direct approach towards pinnipeds that are hauled out. If it is absolutely necessary to make movements towards pinnipeds, personnel will approach in a slow and steady manner to reduce the behavioral harassment to the animals as much as possible;

(ix) Hydroacoustic monitoring; and

(x) Hydroacoustic monitoring shall be performed using an appropriate method reviewed and approved by NMFS.

(b) Reporting.

(1) MMOs must use NMFS-approved monitoring forms and shall record the following information when a marine mammal is observed:

(i) Date and time that pile removal and/or installation begins and ends;

(ii) Construction activities occurring during each observation period;

(iii) Weather parameters (*e.g.,* percent cover, visibility);

(iv) Water conditions [*e.g.,* sea state, tidal state (incoming, outgoing, slack, low, and high)];

(v) Species, numbers, and, if possible, sex and age class of marine mammals;

(vi) Marine mammal behavior patterns observed, including bearing and direction of travel, and, if possible, the correlation to SPLs;

(vii) Distance from pile removal and/ or installation activities to marine mammals and distance from the marine mammal to the observation point;

(viii) Locations of all marine mammal observations; and

(ix) Other human activity in the area.

(2) [Reserved]

(c) The Corps shall submit a draft annual report to NMFS Office of Protected Resources covering a given calendar year within ninety days of the last day of pile driving operations. The annual report shall include summaries of the information described in paragraph (b)(1) of this section.

(d) The Corps shall submit a final annual report to the Office of Protected Resources, NMFS, within thirty days after receiving comments from NMFS on the draft report.

(e) Notification of dead or injured marine mammals.

(1) In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by this Authorization, such as an injury (Level A harassment), serious injury, or mortality, The Corps shall immediately cease the specified activities and report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS.

(i) The report must include the following information:

(A) Time, date, and location (latitude/ longitude) of the incident;

(B) Description of the incident;

(C) Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility);

(D) Description of marine mammal observations in the 24 hours preceding the incident;

(E) Species identification or description of the animal(s) involved;

(F) Status of all sound source use in the 24 hours preceding the incident;

(G) Fate of the animal(s); and

(H) Photographs or video footage of the animal(s). Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with the Corps to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The Corps may not resume their activities until notified by NMFS.

(ii) In the event that the Corps discovers an injured or dead marine mammal, and the lead MMO determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.,* in less than a moderate state of decomposition), the Corps shall immediately report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS. The report must include the same information identified in paragraph (e) of this section. If the observed marine mammal is dead, activities may continue while NMFS reviews the circumstances of the incident. If the observed marine mammal is injured, measures described in paragraph (e) (of this section must be implemented. NMFS will work with the Corps to determine whether additional mitigation measures or modifications to the activities are appropriate.

(iii) In the event that the Corps discovers an injured or dead marine mammal, and the lead MMO determines that the injury or death is not associated with or related to the activities authorized in the LOA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, scavenger damage), the Corps shall report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS, within 24 hours of the discovery. The Corps shall provide photographs or video footage or other documentation of the stranded animal sighting to NMFS. If the observed marine mammal is dead, activities may continue while NMFS reviews the circumstances of the incident. If the observed marine mammal is injured, measures described in paragraph (e) must be implemented. In this case, NMFS will notify the Corps when activities may resume.

§ 217.236 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the Corps must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, the Corps may apply for and obtain a renewal of the Letter of Authorization.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the Corps must apply for and obtain a modification of the Letter of Authorization as described in § 217.237.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the **Federal Register** within thirty days of a determination.

§ 217.237 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under § 216.106 of this chapter and § 217.236 for the activity identified in § 217.230(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section; and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in § 217.247(c)(1)) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under § 216.106 of this chapter and § 217.236 for the activity identified in § 217.230(a) may be modified by NMFS under the following circumstances:

(1) *Adaptive management*—NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with the Corps regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in a LOA:

(A) Results from the Corps' monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) *Emergencies*—If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 217.232(b), an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within thirty days of the action.

[FR Doc. 2016–20018 Filed 8–24–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

RIN 0648–BG19

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 45

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of availability; request for comments.

SUMMARY: The Gulf of Mexico (Gulf) Fishery Management Council (Council) has submitted Amendment 45 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP) for review, approval, and implementation by NMFS. Amendment 45 would extend the sunset date of the red snapper sector separation measures for an additional 5 years, through the end of the 2022 fishing year. The intent of Amendment 45 is to extend the sector separation measures to allow the Council more time to consider and possibly develop alternative management strategies within the Gulf red snapper recreational sector.

DATES: Written comments must be received on or before October 24, 2016.

ADDRESSES: You may submit comments on the amendment identified by "NOAA–NMFS–2016–0089" by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2016-0089,* click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Peter Hood, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

Electronic copies of Amendment 45, which includes an environmental assessment, a fishery impact statement, a Regulatory Flexibility Act analysis, and a regulatory impact review, may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Peter Hood, Southeast Regional Office, NMFS, telephone: 727–824–5305; email: *Peter.Hood@noaa.gov.*

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires each regional fishery management council to submit any fishery management plan or amendment to any plan to NMFS for review and approval, partial approval, or disapproval. The Magnuson-Stevens Act also requires that NMFS, upon receiving a plan or plan amendment, publish an announcement in the **Federal Register** notifying the public that the plan or plan amendment is available for review and comment.

The FMP being revised by Amendment 45 was prepared by the Council and implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Act.

Background

Amendment 40 to the FMP separated the Federal recreational red snapper sector as a way to provide the basis for increased flexibility in future management as well as minimize the chance for recreational quota overruns, which could jeopardize the rebuilding of the red snapper stock (80 FR 22422, April 22, 2015). Amendment 40 established sector separation by defining distinct private angling and Federal for-hire (charter vessel and headboat) components within the recreational sector of those who fish for red snapper, allocated red snapper resources between the components, and established component-specific accountability measures through the use of component annual catch targets to project recreational fishing season lengths. Amendment 40 defined the Federal for-hire component as including operators of vessels with Federal charter vessel/headboat permits for Gulf reef fish and their angler clients. The private angling component was defined as including anglers fishing from private vessels and state-permitted for-hire vessels.

Amendment 40 also applied a 3-year sunset provision for the regulations implemented through its final rule. The sunset provision maintained the measures for sector separation through the end of the 2017 fishing year, on December 31, 2017. The 3-year sunset provision was included to provide an incentive for the Council to continue to evaluate alternative management measures or programs for the recreational sector. Unless modified, after the 2017 fishing year, on January 1, 2018, the management measures implemented through Amendment 40 will expire and the recreational sector will be managed as a single entity. The Council is currently working to develop and approve other amendments to address the management of the charter and headboat fishing within the Federal for-hire component (Amendments 41 and 42 to the FMP, respectively). The development of these amendments is taking longer than the Council anticipated, and if approved by NMFS, would likely not be effective until after the sector separation provisions expire on December 31, 2017. Therefore, the Council determined there was a need to extend the sunset provision for an additional 5 years past the original sunset date.

Management Measure Contained in Amendment 45

Amendment 45 would extend the 3-year sunset provision for the separation of the Federal for-hire and private angling recreational components for Gulf red snapper and associated management measures for an additional 5 years. If implemented, this would extend Gulf recreational red snapper sector separation through the end of the 2022 fishing year, on December 31, 2022, rather than the current sunset date of December 31, 2017. Beginning on January 1, 2023, the red snapper recreational sector would be managed as a single entity without the separate Federal for-hire and private angling components. The Council would need to take further action for these recreational components and management measures to extend beyond the 5-year extension proposed in Amendment 45.

A proposed rule that would implement Amendment 45 has been drafted. In accordance with the Magnuson-Stevens Act, NMFS is evaluating Amendment 45 to determine whether it is consistent with the FMP, the Magnuson-Stevens Act, and other applicable law. If the determination is affirmative, NMFS will publish the proposed rule in the **Federal Register** for public review and comment.

Consideration of Public Comments

The Council has submitted Amendment 45 for Secretarial review, approval, and implementation. Comments on Amendment 45 must be received by October 24, 2016. Comments received during the respective comment periods, whether specifically directed to the amendment or the proposed rule, will be considered by NMFS in its decision to approve, partially approve, or disapprove Amendment 45. All comments received by NMFS on the amendment or the proposed rule during their respective comment periods will be addressed in the final rule.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 22, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–20404 Filed 8–24–16; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 81, No. 165
Thursday, August 25, 2016

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Office of Advocacy and Outreach

Notice of Request for Approval of an Information Collection

AGENCY: Office of Advocacy and Outreach, USDA.

ACTION: Notice and request for comments; correction.

SUMMARY: This notice announces the intent, in accordance with the Paperwork Reduction Act of 1995, of the Office of Advocacy and Outreach (OAO) to request an extension/revision of a currently approved information collection to the Minority Farm Register. The Minority Farm Register is a voluntary register of minority farm and ranch operators, landowners, tenants, and others with an interest in farming or agriculture. The OAO uses the collected information to better inform minority farmers about U.S. Department of Agriculture (USDA) programs and services.

DATES: We will consider comments received by October 17, 2016, at 5:00 p.m. EST.

ADDRESSES: We invite you to submit comments on this notice. In your comments, include date, volume, and page number of this issue of the **Federal Register**. You may submit comments by any of the following methods: (1) Federal eRulemaking Portal: Go to *http://regulations.gov* and follow the online instructions for submitting comments; (2) Mail: U.S. Department of Agriculture, Office of Advocacy and Outreach, Attn: Kenya Nicholas, Program Director, Whitten Building Room 520–A, Mail Stop 0601, 1400 Independence Avenue SW., Washington, DC 20250; and (3) Fax: (202) 720–7704.

How to File a Complaint of Discrimination: To file a complaint of discrimination, complete the USDA Program Discrimination Complaint Form, which may be accessed online at: *http://www.ocio.usda.gov/sites/default/files/docs/2012/Complain_combined_6_8_12.pdf,* or write a letter signed by you or your authorized representative.

Send your completed complaint form or letter to USDA by mail, fax, or email:

Mail: U.S. Department of Agriculture Director, Office of Adjudication 1400 Independence Avenue SW., Washington, DC 20250–9410.

Fax: (202) 690–7442.

Email: program.intake@usda.gov.

FOR FURTHER INFORMATION CONTACT:

Agency Contact: U.S. Department of Agriculture, Office of Advocacy and Outreach, Attention: Kenya Nicholas, Program Director, Whitten Building Room 520–A, Mail Stop 0601, 1400 Independence Avenue SW., Washington, DC 20250, Phone: (202) 720–6350, Fax: (202) 720–7704, Email: *kenya.nicholas@osec.usda.gov.*

Persons with Disabilities: Persons who require alternative means for communication (Braille, large print, audiotape, etc.), should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

SUPPLEMENTARY INFORMATION:

Title: USDA Minority Farm Register.

Correction: In the **Federal Register** of August 16, 2016, FR Doc. 2016–19532, on page 54551, make the following correction to the OMB Number:

The second column, titled "SUPPLEMENTARY INFORMATION:", should read:

Office of Management and Budget (OMB) Number: 0508–0005.

Expiration Date: October 31, 2016.

Signed August 18, 2016.

Christian Obineme,

Associate Director, Office of Advocacy and Outreach.

[FR Doc. 2016–20390 Filed 8–24–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2016–0061]

Notice of Request for Revision to and Extension of Approval of an Information Collection; Untreated Oranges, Tangerines, and Grapefruit From Mexico Transiting the United States to Foreign Countries

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Revision to and extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request a revision to and extension of approval of an information collection associated with the regulations for the transit of untreated oranges, tangerines, and grapefruit from Mexico through the United States to foreign countries.

DATES: We will consider all comments that we receive on or before October 24, 2016.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0061.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2016–0061, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS-2016-0061* or in our reading room, which is located in Room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading Room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the regulations for the transit of untreated oranges, tangerines, and grapefruit from Mexico through the United States to foreign countries, contact Mr. David Hanken, National Policy Manager, QPAS, PPQ, APHIS, 4700 River Road Unit 60, Riverdale MD 20737; (301) 851–2195. For copies of more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851–2727.

SUPPLEMENTARY INFORMATION:

Title: Untreated Oranges, Tangerines, and Grapefruit from Mexico Transiting the United States to Foreign Countries.

OMB Control Number: 0579–0303.

Type of Request: Revision to and extension of approval of an information collection.

Abstract: The Plant Protection Act (7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, or interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests into or their dissemination within the United States. This authority has been delegated to the Animal and Plant Health Inspection Service (APHIS).

The plant quarantine safeguard regulations in 7 CFR part 352 allow certain products or articles that are classified as prohibited or restricted under other APHIS regulations in title 7 to be moved into or through the United States under certain conditions. Such articles include fruits and vegetables that are moved into the United States for: (1) A temporary stay where unloading or landing is not intended; (2) unloading or landing for transshipment and exportation; (3) unloading or landing for transportation and exportation; or (4) unloading and entry at a port other than the port of first arrival. Fruits and vegetables that are moved into the United States under these circumstances are subject to inspection and must be handled in accordance with conditions assigned under the safeguard regulations to prevent the introduction and dissemination of plant pests.

In accordance with § 352.30, untreated oranges, tangerines, and grapefruit from Mexico may be moved into or through the United States in transit to foreign countries under certain conditions to prevent the introduction of plant pests into the United States. These conditions involve the use of information collection activities. Previously, this collection included only a transit permit. In this extension of approval request, we are adding the activities of a transportation and exportation permit, inspection, inspection certificate, and notice of arrival.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities, as described, for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.,* permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.67 hours per response.

Respondents: Shippers.

Estimated annual number of respondents: 3.

Estimated annual number of responses per respondent: 13.

Estimated annual number of responses: 39.

Estimated total annual burden on respondents: 26 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 22nd day of August 2016.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2016–20496 Filed 8–24–16; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Submission for OMB Review; Comment Request

August 22, 2016.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by September 26, 2016 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@omb.eop.gov* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: CACFP National Disqualified List—Forms FNS–843 and FNS–844.

OMB Control Number: 0584–0584.

Summary of Collection: Section 17 of the National School Lunch Act, as amended (42 U.S.C. 1766), authorizes the Child and Adult Care Food Program (CACFP). Section 243(c) of Public Law 106–224, the Agricultural Risk Protection Act of 2000, amended section 17(d)(5) of the Richard B. Russell National School Lunch Act (NSLA) (42 U.S.C. 1766(d)(5)(E)(i) and (ii)) by requiring the Department of Agriculture to maintain a list of institutions, day care home providers, and individuals that have been terminated or otherwise disqualified from CACFP participation. The law also requires the Department to make the list available to State agencies for their use in reviewing applications to participate and to sponsoring organizations to ensure that they do not employ as principals any persons who are disqualified from the program. This statutory mandate has been incorporated into § 226.6(c)(7) of the Program regulations.

Need and Use of the Information: The Food and Nutrition Service (FNS) uses forms FNS–843 Report of Disqualification from Participation—Institution and Responsible Principals/Individuals and FNS–844 Report of Disqualification from Participation—Individually Disqualified Responsible Principal/Individual or Day Care Home Provider to collect and maintain the disqualification data. The State agencies use these forms, which are accessed through a web-based National Disqualification List system, to collect the contact information and the disqualification information and reasons on all individuals and institutions that have been disqualified and are therefore ineligible to participate in CACFP. The information is collected from State agencies as the disqualifications occur so that the list is kept current. By maintaining this list, the Department ensures program integrity by making the list available to sponsoring organizations and State agencies so that no one who has been disqualified can participate in CACFP. Without this data collection, State agencies and sponsoring organizations would have no way of knowing if an applicant has been disqualified from participating in CACFP in another State.

Description of Respondents: State, Local, or Tribal Government.

Number of Respondents: 56.

Frequency of Responses: Reporting: On occasion; Other (as needed).

Total Burden Hours: 784.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2016–20371 Filed 8–24–16; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Forest Service

Black Hills National Forest, South Dakota and Wyoming, Black Hills Resilient Landscapes Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Forest Service is proposing forest resilience management actions on portions of approximately 1,098,000 acres of National Forest System lands managed by the Black Hills National Forest.

The project area consists of lands within the treatment areas designated on the Black Hills National Forest in South Dakota and Wyoming under the authority of the Healthy Forests Restoration Act (HFRA, 16 U.S.C. 6591). The Black Hills Resilient Landscapes Project will be carried out in accordance with HFRA title VI, section 602(d)—Insect and Disease Infestation.

Since 1997, the Black Hills National Forest has experienced epidemic levels of mountain pine beetle infestation. The epidemic now appears to be slowing in most parts of the forest, but the infestation has left behind a changed landscape. Action is needed to address accumulations of fuels, undesirable distribution of forest structures, and other conditions that may decrease the forest's resilience to disturbance.

The purpose of the project is to move landscape-level vegetation conditions in the project area toward objectives of the Black Hills National Forest Land and Resource Management Plan, as amended, in order to increase ecosystem resilience to insect infestation and other natural disturbances, contribute to public safety and the local economy, and reduce risk of wildfire to landscapes and communities.

The Forest Service will prepare an Environmental Impact Statement to disclose the potential environmental effects of implementing resilience treatments on National Forest System lands within the project area.

DATES: Comments concerning the scope of the analysis must be received by September 26, 2016. The draft environmental impact statement is expected in April 2017 and the final environmental impact statement is expected in October 2017.

ADDRESSES: Send written comments to BHRL Project, Black Hills National Forest, 1019 North 5th Street, Custer, SD 57730, or via facsimile to 605–673–9350, c/o BHRL Project. Written comments also may be hand-delivered to the above address between 8:00 a.m. and 4:30 p.m. Mountain time, Monday through Friday except federal holidays. Comments may also be submitted electronically at *http://tinyurl.com/BHRLProjectComment.*

FOR FURTHER INFORMATION CONTACT: Rhonda O'Byrne, Project Manager, at 605–642–4622. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

Since 1997, the Black Hills National Forest has experienced epidemic levels of mountain pine beetle infestation. Beetles have infested and killed trees on approximately 215,000 acres. In some areas, there are very few live, mature pine remaining. In others, the beetles only attacked pockets of trees, or very few trees. The Forest Service and its partners have responded to the epidemic by reducing stand susceptibility to beetle infestation, recovering the value of some infested trees, protecting recreation areas, and decreasing fuel build-up in some areas.

The epidemic now appears to be slowing in most parts of the forest, but the beetles have left behind a changed landscape. Much of the forest is more open. The distribution of pine forest structure has moved away from desired conditions. The Black Hills National Forest Land and Resource Management Plan ("Forest Plan") sets these desired conditions. They are a critical part of maintaining a landscape that provides diverse habitat and is resilient to disturbance.

Pine forest structure objectives apply to most of the National Forest. The current condition of some structural stages is inconsistent with the desired condition. Over time, the open and young forest structures resulting from the infestation are likely to develop characteristics that will decrease the forest's resilience to insect infestation, wildfire, and other disturbances. In the newly open stands, natural reforestation is occurring as pine seedlings become established. Ponderosa pine regenerates prolifically in the Black Hills, and often there are so many small trees that they become crowded and must compete for limited resources. Growth slows, stems remain thin, and heavy snow can result in widespread damage. There is a need to manage these new stands to prevent stagnation and allow transition to other structural stages.

Mountain pine beetles most often infest dense pine stands. As a result of the epidemic, acreage of mature, moderately dense pine stands has decreased below Forest Plan objective levels. Mature, dense pine stands are still slightly above objective levels, though most of them are concentrated in a few areas that experienced less beetle infestation. There is a need to increase mature, moderately dense pine stands and maintain mature, dense pine stands. Late succession pine forests in the Black Hills provide habitat diversity and enhance scenery. There are fewer late succession stands than desired, and there is a need to maintain and enhance old stands to work toward meeting this objective.

The beetle infestation also has resulted in hazardous fuels in the form of dead trees. The trees usually fall within a few years of being infested and can pile up and cause uncharacteristically high fuel loadings. These fuels are unlikely to ignite easily, but if they do catch fire they can burn intensely, damaging soils and causing problems for firefighters. In addition, the dead trees pose an increased hazard to public health and safety, infrastructure, and communities. There is a need to reduce this hazard, especially near populated areas and critical infrastructure.

Mature ponderosa pine are often resistant to fire, especially if there is some space between trees or if they have had periodic exposure to low-level fire. Small pine trees are not resistant to fire, and dense patches can allow a fire to spread both vertically and horizontally. There is a need to thin out these small trees to prevent development of a fire hazard. Historically, fire was a major force shaping the composition and distribution of Black Hills plant communities and ecological processes. Fire suppression over the last 140 years has altered plant communities and allowed fuels to accumulate, especially in less accessible areas. There is a need to use prescribed fire to efficiently reduce fuel buildup while providing the ecosystem benefits of a disturbance process that native species evolved with.

Ponderosa pine covers most of the Black Hills. Other tree species and grasslands diversify habitat and scenery while increasing ecosystem resilience to disturbance. Hardwood trees such as aspen and oak are resistant to fire and to the insects that infest pine. Aspen stands recover quickly from disturbance. Over time, however, these areas can become overgrown with conifers. This encroachment can cause old hardwood stands and grasslands to lose vigor and gradually disappear. There is a need to maintain and perpetuate these ecosystem components.

In response to these needs, the Forest Service is proposing actions to move landscape-level vegetation conditions in the project area toward objectives of the Forest Plan in order to increase ecosystem resilience to insect infestation and other natural disturbances, contribute to public safety and the local economy, and reduce risk of wildfire to landscapes and communities.

The Black Hills National Forest Advisory Board has agreed to serve as the formal collaborator for this project under HFRA authority.

Proposed Action

The proposed action addresses the purpose and need through a combination of forest vegetation management actions. Activities would start in approximately 2018 and continue for up to 10 years.

Where heavy down fuels or dense stands of small pine exist adjacent to residential areas, main access roads, major power lines, and other developments or infrastructure, the project would reduce fire hazard by thinning, chipping, piling, or otherwise removing or rearranging fuels. Work would focus on priority areas. Where slopes are too steep for other types of treatment, the project would burn pockets of hazardous fuels. These activities would occur on 3,000 to 7,000 acres annually. Fuel reduction work would include cutting of standing beetle-killed trees that could fall and block main access roads. The project proposes prescribed burning on up to 10,000 acres per year, primarily in the southern half of the Black Hills.

The project would cut encroaching pine from areas of hardwoods and grasslands. Pine removal from aspen would take place on up to 6,000 acres. Pine removal from oak stands would take place on up to 3,000 acres. Pine would be cut from encroached grasslands on up to 5,600 acres. Regeneration of declining aspen stands would occur on up to 5,000 acres.

Currently, approximately 43 percent of project area pine stands consist of open, mature forest, while the objective is 25 percent. The project proposes to convert some of these mature stands to young stands by removing some or all of the mature trees if there are enough pine seedlings and saplings to make a new stand. This may occur on up to a total of about 100,000 acres out of the total 300,000 acres of open, mature pine forest. The intent of this project is not to create very large areas of forest that is all alike. Therefore, the project would include limits on the maximum contiguous acreage of any one forest condition that could be created.

Existing roads provide access to most of the potential treatment stands. To conduct proposed activities in areas without existing roads, it may be necessary to construct up to 15 miles of permanent roads and 44 miles of temporary roads.

The project would conduct fuel treatments in some of the remaining mature, dense pine stands. Because the objective is to increase moderately dense mature forest, mature trees in these stands would generally not be cut. There would be exceptions, such as removing beetle-infested trees or thinning to reduce hazardous fuels adjacent to homes.

The forest is below objectives for late succession forest. In some stands that are nearing late succession conditions, especially those with open canopies, the project would thin or burn understory vegetation to enhance late succession characteristics and increase stand resilience.

Removing some of the small trees in young stands (precommercial thinning) increases the vigor of the remaining saplings and prevents stagnation. The project would precommercially thin up to 25,000 acres per year.

Connected actions include road improvement, non-native invasive weed treatment, and other activities. The proposed action includes design features and mitigation necessary to ensure project compliance with directives, regulations, and Forest Plan standards and guidelines. Go to *http://tinyurl.com/BHRLProject* for more detailed information and maps of the project area and proposed treatments.

Forest Plan Amendments

If necessary to meet the project's purpose and need, the Forest Service may need to amend the Forest Plan in regard to reducing fuel loading by removing logging slash in certain areas.

Responsible Official

Mark Van Every, Black Hills National Forest Supervisor.

Nature of Decision To Be Made

This proposed action is a proposal, not a decision. The Forest Supervisor of the Black Hills National Forest will decide whether to implement the action as proposed, whether to take no action at this time, or whether to implement any alternatives that are analyzed. The Forest Supervisor will also decide whether to amend the Forest Plan if necessary to implement the decision.

Preliminary Issues

Anticipated issues include effects on threatened, endangered, and sensitive species, changes to scenery, and the unique fire hazards posed by fallen trees and regenerating stands.

Scoping Process

This notice of intent initiates the scoping process, which guides the development of the environmental impact statement. It is important that reviewers provide their comments at such times and in such manner that they are useful to the agency's preparation of the environmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered, however.

Dated: August 15, 2016.

Jim Zornes,

Acting Forest Supervisor.

[FR Doc. 2016–20382 Filed 8–24–16; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–55–2016]

Foreign-Trade Zone (FTZ) 281—Miami, Florida; Notification of Proposed Production Activity Carrier InterAmerica Corporation (Heating, Ventilating and Air Conditioning Systems); Miami, Florida

Miami-Dade County, grantee of FTZ 281, submitted a notification of proposed production activity to the FTZ Board on behalf of Carrier InterAmerica Corporation (Carrier), located in Miami, Florida. The notification conforming to the requirements of the regulations of the FTZ Board (15 CFR 400.22) was received on August 5, 2016.

The Carrier facility is located within Site 3 of FTZ 281. The facility is used to combine and segregate mini-split and multi-split type heating, ventilating, and air conditioning (HVAC) systems. Pursuant to 15 CFR 400.14(b), FTZ activity would be limited to the specific foreign-status materials and components and specific finished products described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt Carrier from customs duty payments on the foreign-status components used in export production. On its domestic sales, Carrier would be able to choose the duty rates during customs entry procedures that apply to mini-split and multi-split type HVAC systems and their component evaporator and condensing units (duty rates range from 1% to 2.2%) for the foreign-status inputs noted below. Customs duties also could possibly be deferred or reduced on foreign-status production equipment.

The components and materials sourced from abroad include: Mini-split type HVAC systems, evaporator units and condensing units (duty rates range from 1% to 2.2%).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is October 4, 2016.

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the "Reading Room" section of the Board's Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Diane Finver at *Diane.Finver@trade.gov* or (202) 482–1367.

Dated: August 18, 2016.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2016–20327 Filed 8–24–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

President's Export Council Subcommittee on Export Administration; Notice of Partially Closed Meeting

The President's Export Council Subcommittee on Export Administration (PECSEA) will meet on September 15, 2016, 10:00 a.m., at the U.S. Department of Commerce, Herbert C. Hoover Building, Room 3884, 14th Street between Pennsylvania and Constitution Avenues NW., Washington, DC The PECSEA provides advice on matters pertinent to those portions of the Export Administration Act, as amended, that deal with United States policies of encouraging trade with all countries with which the United States has diplomatic or trading relations and of controlling trade for national security and foreign policy reasons.

Agenda

Open Session

1. Opening remarks by the Chairman and Vice Chairman.
2. Opening remarks by the Bureau of Industry and Security.
3. Export Control Reform Update.
4. Presentation of papers or comments by the Public.
5. Discussion of Reexport Technical Advisory Committee
6. Single Form Update
7. Subcommittee Updates
8. Discussion of Topics for Next Administration Action

Closed Session

9. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 25 participants on a first come, first served basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov* no later than September 8, 2016.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate the distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer via email.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on March 9, 2016, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 § (10)(d)), that the portion of the meeting dealing with pre-decisional changes to the Commerce Control List and U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482–2813.

Dated: August 18, 2016.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2016–20335 Filed 8–24–16; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

President's Export Council: Meeting of the President's Export Council

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of an open meeting.

SUMMARY: The President's Export Council (Council) will hold a meeting to deliberate on recommendations related to promoting the expansion of U.S. exports. Priority topics will include: the Trans-Pacific Partnership and Board appointments for the Export-Import Bank of the United States. Additional topics may include: the Administration's trade agenda, infrastructure investment, workforce readiness, access to capital for microbusinesses and SMEs, and export control reform. The final agenda will be posted at least one week in advance of the meeting on the President's Export Council Web site at *http://trade.gov/pec.*

DATES: September 14, 2016 at 9:30 a.m. (ET)

ADDRESSES: The President's Export Council meeting will be broadcast via live webcast on the Internet at *http://whitehouse.gov/live.*

FOR FURTHER INFORMATION CONTACT: Tricia Van Orden, Designated Federal Officer, President's Export Council, Room 4043, 1401 Constitution Avenue NW., Washington, DC 20230, telephone: 202–482–5876, email: *tricia.vanorden@trade.gov.*

Press inquiries should be directed to the International Trade Administration's Office of Public Affairs, telephone: 202–482–3809.

SUPPLEMENTARY INFORMATION:

Background: The President's Export Council was first established by Executive Order on December 20, 1973 to advise the President on matters relating to U.S. export trade and to report to the President on its activities and recommendations for expanding U.S. exports. The President's Export Council was renewed most recently by Executive Order 13708 of September 30, 2015, for the two-year period ending September 30, 2017. This Committee is established in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. App.

Public Submissions: The public is invited to submit written statements to the President's Export Council. Statements must be received by 5:00PM ET on September 12, 2016 by either of the following methods:

a. Electronic Submissions

Submit statements electronically to Tricia Van Orden, Executive Secretary, President's Export Council via email: *tricia.vanorden@trade.gov.*

b. Paper Submissions

Send paper statements to Tricia Van Orden, Designated Federal Officer, President's Export Council, Room 4043, 1401 Constitution Avenue NW., Washington, DC, 20230.

Statements will be posted on the President's Export Council Web site (*http://trade.gov/pec*) without change, including any business or personal information provided such as names, addresses, email addresses, or telephone numbers. All statements received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. You should submit only information that you wish to make publicly available.

Meeting minutes: Copies of the Council's meeting minutes will be available within ninety (90) days of the meeting.

Dated: August 18, 2016.

Tricia Van Orden,

Designated Federal Officer, President's Export Council.

[FR Doc. 2016–20294 Filed 8–24–16; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[Docket No. 160811727–6727–01]

RIN 0625–XC023

U.S.-EU Safe Harbor Framework Self-Certification Notice

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice of discontinuation of the U.S.-EU Safe Harbor Framework.

SUMMARY: The International Trade Administration (ITA) issues this notice regarding the U.S.-EU Safe Harbor Framework (U.S.-EU Safe Harbor). As of August 1, 2016, the Department of Commerce no longer accepts new submissions of self-certification to the U.S.-EU Safe Harbor. As of October 31, 2016, the Department of Commerce will no longer accept re-certification submissions to the U.S.-EU Safe Harbor.

DATES: The Department of Commerce stopped accepting new submissions of self-certification to the U.S.-EU Safe Harbor on August 1, 2016. As of October 31, 2016, the Department of Commerce will no longer accept re-certification submissions to the U.S.-EU Safe Harbor.

FOR FURTHER INFORMATION CONTACT: Shannon Coe, International Trade Administration, 202–482–6013 or *Shannon.Coe@trade.gov.*

SUPPLEMENTARY INFORMATION: On October 6, 2015, the European Court of Justice issued a judgment [1] declaring as "invalid" the European Commission's Decision 2000/520/EC of 26 July 2000 "on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce." According to that decision, the U.S.-EU Safe Harbor Framework has not been a valid mechanism to comply with EU data protection requirements when transferring personal data from the European Union to the United States.

On July 12, U.S. Secretary of Commerce Penny Pritzker joined European Union Commissioner Věra Jourová to announce [2] the approval of the EU-U.S. Privacy Shield Framework,[3] replacing the U.S.-EU Safe Harbor. The EU-U.S. Privacy Shield Framework provides companies on both sides of the Atlantic with a mechanism to comply with European Union data protection requirements when transferring personal data from the European Union to the United States in support of transatlantic commerce. The Department of Commerce started accepting certifications [4] to the EU-U.S. Privacy Shield Framework [5] on August 1st.

As of August 1, 2016, the Department of Commerce stopped accepting new submissions for self-certification to the U.S.-EU Safe Harbor Framework; as of October 31, 2016, the Department of Commerce will stop accepting re-certification submissions to the U.S.-EU Safe Harbor Framework. The Department will maintain the U.S.-EU Safe Harbor List; [6] pursuant to the Safe Harbor Frequently Asked Question on Self-Certification, the commitment to adhere to the Safe Harbor Principles is not time-limited, and a participating organization must continue to apply the Safe Harbor Principles to data received under the Safe Harbor.

Please note that the Department of Commerce will continue to administer the U.S.-Swiss Safe Harbor Framework.

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[1] *http://curia.europa.eu/juris/document/document.jsf?text=&docid=169195&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=125031.*

[2] *https://www.commerce.gov/news/secretary-speeches/2016/07/remarks-us-secretary-commerce-penny-pritzker-eu-us-privacy-shield.*

[3] *http://ec.europa.eu/justice/data-protection/files/annexes_eu-us_privacy_shield_en.pdf.*

[4] *https://www.commerce.gov/sites/commerce.gov/files/media/files/2016/how_to_join_privacy_shield_sc_cmts.pdf.*

[5] *http://ec.europa.eu/justice/data-protection/files/annexes_eu-us_privacy_shield_en.pdf.*

[6] *https://safeharbor.export.gov/list.aspx.*

For more information on the EU-U.S. Privacy Shield Framework, please visit *www.privacyshield.gov.*

Dated: August 17, 2016.

Praveen Dixit,

Acting Assistant Secretary for Industry and Analysis, International Trade Administration, U.S. Department of Commerce.

[FR Doc. 2016–20421 Filed 8–24–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–983]

Drawn Stainless Steel Sinks From the People's Republic of China: Notice of Court Decision Not in Harmony With Amended Final Determination Pursuant to Court Decision

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce

SUMMARY: On July 14, 2016, the United States Court of International Trade ("CIT") sustained the redetermination made by the Department of Commerce ("Department") pursuant to the CIT's remand of the final determination in the antidumping duty ("AD") investigation on drawn stainless steel sinks ("sinks") from the People's Republic of China ("PRC"). Specifically, the CIT affirmed the Department's reliance on Thai data to value stainless steel inputs and revised calculation of selling, general, administrative ("SG&A") expenses on redetermination. Accordingly, the Department is hereby notifying the public that the final judgment in this case is not in harmony with the final affirmative determination in the underlying AD investigation and, as there is a now a final and conclusive decision in this case, is amending the final determination with respect to the dumping margins determined for Guangdong Dongyuan Kitchenware Industrial Company, Ltd. ("Dongyuan"), Foshan Zhaoshun Trade Co., Ltd. and Zhongshan Superte Kitchenware Co., Ltd. (collectively, "Superte"), as well as all other companies that received a separate rate.

DATES: Effective July 24, 2016.

FOR FURTHER INFORMATION CONTACT: Eve Wang, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–6231.

SUPPLEMENTARY INFORMATION:

Background

Subsequent to the publication of the *Final Determination* [1] in the underlying AD investigation of sinks from the PRC, Dongyuan (a respondent in the underlying investigation) and Elkay Manufacturing Company (the petitioner in the underlying investigation) filed complaints with the CIT challenging aspects of the methodology used to determine the dumping margins in the *Final Determination.*

On December 22, 2014, the CIT granted the Department's partial voluntary remand request to reconsider the use of Global Trade Atlas ("GTA") import data for Thailand to value cold-rolled stainless steel coil, and also directed the Department to reconsider its methodology of accounting for SG&A expenses in the normal value calculations.[2]

Pursuant to the CIT's instructions on remand, the Department further evaluated the information on the record regarding the valuation of cold-rolled stainless steel coil inputs and determined to continue to use the GTA import data for Thailand to value these inputs.[3] Furthermore, in compliance with the remand directive, the Department classified SG&A labor items as SG&A expenses in each company's surrogate financial ratio calculation, resulting in a change to the margins calculated for each respondent.[4] On July 14, 2016, the CIT affirmed the remand redetermination.[5]

Timken Notice

In *Timken Co.* v. *United States,* 893 F.2d 337, 341 (Fed. Cir. 1990) ("*Timken*"), as clarified by *Diamond Sawblades Mfrs. Coalition* v. *United States,* 626 F.3d 1374 (Fed. Cir. 2010) ("*Diamond Sawblades*"), the United States Court of Appeals for the Federal Circuit ("CAFC") held that, pursuant to section 516A(e) of the Tariff Act of 1930, as amended ("the Act"), the Department must publish a notice of a court decision that is not "in harmony" with a Department determination and must suspend liquidation of entries pending a "conclusive" court decision. The CIT's July 14, 2016, judgment in this case constitutes a final court decision that is not in harmony with the Department's *Final Determination.* This notice is published in fulfillment of the publication requirements of *Timken.*

Amended Final Determination

As a result of the Court's final decision with respect to this case, the Department is amending the *Final Determination* with respect to Dongyuan, Superte, and all other companies that received a separate rate in the *Final Determination.* The revised weighted-average dumping margins for the July 1, 2011, through December 31, 2011, period of investigation are as follows:

Exporter	Producer	Weighted-average margin (percent)
Zhongshan Superte Kitchenware Co., Ltd./Zhongshan Superte Kitchenware Co., Ltd. invoiced as Foshan Zhaoshun Trade Co., Ltd.	Zhongshan Superte Kitchenware Co., Ltd	50.11
Guangdong Dongyuan Kitchenware Industrial Co., Ltd	Guangdong Dongyuan Kitchenware Industrial Co., Ltd	36.59
B&R Industries Limited	Xinhe Stainless Steel Products Co., Ltd. and Jiamen XHHL Stainless Steel Manufacturing Co., Ltd.	43.35

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[1] *See Drawn Stainless Steel Sinks From the People's Republic of China: Investigation, Final Determination,* 78 FR 13019 (February 26, 2013), as amended by *Drawn Stainless Steel Sinks from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order,* 78 FR 21592 (April 11, 2013), (collectively, "*Final Determination*").

[2] *See Elkay Mfg. Co.* v. *United States,* Consol. Court No. 13–00176, Slip Op. 14–150 (CIT 2014) ("*Sinks Remand*"), at 3.

[3] *See* Final Results of Redetermination Pursuant to Court Remand, dated April 22, 2015 ("Final Redetermination"), at 6 and 24.

[4] *Id.*

[5] *See Elkay Mfg. Co.* v. *United States,* Consol. Court No. 13–00176, Slip Op. 16–69 (CIT 2016).

Exporter	Producer	Weighted-average margin (percent)
Elkay (China) Kitchen Solutions, Co., Ltd	Elkay (China) Kitchen Solutions, Co., Ltd	43.35
Feidong Import and Export Co., Ltd	Jiangmen Liantai Kitchen Equipment Co.; Jiangmen Xinhe Stainless Steel Product Co., Ltd.	43.35
Foshan Shunde MingHao Kitchen Utensils Co., Ltd	Foshan Shunde MingHao Kitchen Utensils Co., Ltd	43.35
Franke Asia Sourcing Ltd	Guangdong YingAo Kitchen Utensils Co., Ltd.; Franke (China) Kitchen System Co., Ltd.	43.35
Grand Hill Work Company	Zhongshan Xintian Hardware Co., Ltd	43.35
Guangdong G-Top Import and Export Co., Ltd	Jiangmen Jin Ke Ying Stainless Steel Wares Co., Ltd	43.35
Guangdong Yingao Kitchen Utensils Co., Ltd	Guangdong Yingao Kitchen Utensils Co., Ltd	43.35
Hangzhou Heng's Industries Co., Ltd	Hangzhou Heng's Industries Co., Ltd	43.35
J&C Industries Enterprise Limited	Zhongshan Superte Kitchenware Co., Ltd	43.35
Jiangmen Hongmao Trading Co., Ltd	Xinhe Stainless Steel Products Co., Ltd	43.35
Jiangmen New Star Hi-Tech Enterprise Ltd	Jiangmen New Star Hi-Tech Enterprise Ltd	43.35
Jiangmen Pioneer Import & Export Co., Ltd	Jiangmen Ouert Kitchen Appliance Manufacturing Co., Ltd.; Jiangmen XHHL Stainless Steel Manufacturing Co., Ltd.	43.35
Jiangxi Zoje Kitchen & Bath Industry Co., Ltd	Jiangxi Offidun Industry Co. Ltd	43.35
Ningbo Oulin Kitchen Utensils Co., Ltd	Ningbo Oulin Kitchen Utensils Co., Ltd	43.35
Primy Cooperation Limited	Primy Cooperation Limited	43.35
Shenzhen Kehuaxing Industrial Ltd.[6]	Shenzhen Kehuaxing Industrial Ltd	43.35
Shunde Foodstuffs Import & Export Company Limited of Guangdong.	Bonke Kitchen & Sanitary Industrial Co., Ltd	43.35
Zhongshan Newecan Enterprise Development Corporation	Zhongshan Xintian Hardware Co., Ltd	43.35
Zhuhai Kohler Kitchen & Bathroom Products Co., Ltd	Zhuhai Kohler Kitchen & Bathroom Products Co., Ltd	43.35

Cash Deposit Requirements

Since the *Final Determination,* the Department has established a new cash deposit rate for Dongyuan, Superte, Guangdong Yingao Kitchen Utensils Co., Ltd., and Zhongshan Newecan Enterprise Development Corporation, and further determined that Feidong Import & Export Co., Ltd. is no longer eligible for a separate rate and is considered part of the PRC-wide entity.[7] Therefore, this amended final determination does not change the later-established cash deposit rates for those exporters. All other companies identified in the table above do not have a superseding cash deposit rate and, therefore, the Department will issue revised cash deposit instructions to U.S. Customs and Border Protection, adjusting the cash deposit rate for these separate-rate companies to 43.35 percent, effective July 24, 2016.

Notification to Interested Parties

This notice is issued and published in accordance with sections 516A(e)(1) and 777(i)(1) of the Act.

Dated: August 5, 2016.

Ronald K. Lorentzen,

Acting Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2016–20428 Filed 8–24–16; 8:45 am]

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[6] Though Shenzhen Kehuaxing Industrial Ltd. was not granted a separate rate at the time of the *Final Determination,* it was later determined to be eligible for a separate in the underlying investigation in a prior amended final determination and *Timken* notice. *See Drawn Stainless Steel Sinks From the People's Republic of China: Notice of Court Decision Not in Harmony With Final Determination of Antidumping Duty Investigation,* 79 FR 63079 (October 22, 2014).

[7] *See Drawn Stainless Steel Sinks from the People's Republic of China: Final Results of the Antidumping Duty Administrative Review; 2012–2014,* 80 FR 69644 (November 10, 2015).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–863, A–475–832, A–570–026, A–580–878, A–583–856]

Certain Corrosion-Resistant Steel Products From India, Italy, the People's Republic of China, the Republic of Korea, and Taiwan: Notice of Correction to the Antidumping Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Julia Hancock or Susan Pulongbarit at (202) 482–1394 and (202) 482–4031, respectively (Italy), Kabir Archuletta at (202) 482–2593 (India); Elfi Blum or Lingjun Wang (Korea) at (202) 482–0197 or (202) 482–2316, respectively; Nancy Decker or Andrew Huston at (202) 482–0196 or (202) 482–4261, respectively (PRC); or Shanah Lee or Paul Stolz at (202) 482–6386 and (202) 482–4474, respectively (Taiwan), AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION: On July 25, 2016, the Department of Commerce (the Department) published the *Antidumping Duty Orders* on certain corrosion-resistant steel products from India, Italy, the People's Republic of China (PRC), the Republic of Korea (Korea), and Taiwan.[1] The *Antidumping Duty Orders* contained unintended errors regarding (1) the estimated weighted-average dumping margins for the PRC and (2) the date that the extended period of provisional measures expired.

Estimated Weighted-Average Dumping Margins for PRC

As stated in the *Initiation Notice,*[2] the Department calculates combination rates for respondents that are eligible for a separate rate in non-market economy antidumping duty investigations. Policy Bulletin 05.1 describes this practice.[3] While we correctly listed the PRC rates as combination rates in the *PRC Final*

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[1] *See Certain Corrosion-Resistant Steel Products from India, Italy, the People's Republic of China, the Republic of Korea and Taiwan: Amended Final Affirmative Antidumping Determination for India and Taiwan, and Antidumping Duty Orders,* 81 FR 48390 (July 25, 2016) (*Antidumping Duty Orders*).

[2] *See Certain Corrosion-Resistant Steel Products From Italy, India, the People's Republic of China, the Republic of Korea, and Taiwan: Initiation of Less-Than-Fair-Value Investigations,* 80 FR 37228 (June 30, 2015) (*Initiation Notice*).

[3] *See* Enforcement and Compliance's Policy Bulletin No. 05.1, regarding, "Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries," (April 5, 2005) (Policy Bulletin 05.1), available on the Department's Web site at *http;//enforcement.trade.gov/policy/bull05–1.pdf.*

Determination,[4] we did not list any of the PRC rates as exporter/producer combination rates in the *Antidumping Duty Orders*.[5]

The PRC weighted-average antidumping duty margins and cash deposit rates, as listed in the *Antidumping Duty Orders*, should all be corrected to reflect the following exporter/producer combination rates:

Exporter	Producer	Weighted-average dumping margin (percent)	Cash deposit rate (percent)
Yieh Phui (China) Technomaterial Co., Ltd	Yieh Phui (China) Technomaterial Co., Ltd	209.97	199.43
Jiangyin Zongcheng Steel Co. Ltd	Jiangyin Zongcheng Steel Co. Ltd	209.97	199.43
Union Steel China	Union Steel China	209.97	199.43
PRC-Wide Entity		209.97	199.43

Provisional Measures

In the *Antidumping Duty Orders*, we incorrectly listed the last day of the extended period of provisional measures as July 2, 2016.[6] The correct last day of the extended period of provisional measures is July 1, 2016. Therefore, in accordance with section 733(d) of the Tariff Act of 1930, as amended (the Act) and our practice, the Department will instruct U.S. Customs and Border Protection to terminate the suspension of liquidation and to liquidate, without regard to antidumping duties, unliquidated entries of certain corrosion-resistant steel products from India, Italy, Korea, and the PRC[7] entered, or withdrawn from warehouse, for consumption on or after July 2, 2016, the date on which the provisional measure period expired, until and through the day preceding the date of publication of the International Trade Commission's final injury determinations in the **Federal Register**.

We are now correcting the *Antidumping Duty Orders* for India, Italy, the PRC, Korea, and Taiwan, as noted above.

These corrections to the *Antidumping Duty Orders* for India, Italy, the PRC, Korea, and Taiwan are published in accordance with sections 777(i)(1) of the Act.

Dated: August 19, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2016–20429 Filed 8–24–16; 8:45 am]

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[4] *See Certain Corrosion-Resistant Steel Products from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Critical Circumstances Determination, in Part*, 81 FR 35316 (June 2, 2016) (*PRC Final Determination*).

[5] *See Antidumping Duty Orders* at 48393.

[6] *See Antidumping Duty Orders*, at 48392.

[7] In the *Antidumping Duty Orders*, we inadvertently stated that (1) antidumping duties will be assessed on unliquidated entries of certain corrosion-resistant steel products from Taiwan entered, or withdrawn from warehouse, for consumption on or after January 4, 2016, the date of publication of the preliminary determination, and (2) the last day of the extended period of provisional measures for Taiwan was July 2, 2016. These are both incorrect. Because Taiwan had a negative preliminary determination, the provisional measures period did not expire for Taiwan. *See Certain Corrosion-Resistant Steel Products from Taiwan: Negative Preliminary Determination of Sales at Less Than Fair Value*, 81 FR 72 (January 4, 2016). Thus, we began to suspend liquidation of all entries of certain corrosion-resistant steel products from Taiwan on June 2, 2016, the date of publication of *Taiwan Final Determination. See Certain Corrosion-Resistant Steel Products from Taiwan: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 81 FR 35313 (June 2, 2016) (*Taiwan Final Determination*).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–001]

Potassium Permanganate From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2014

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce ("the Department") is conducting an administrative review of the antidumping duty order on potassium permanganate from the People's Republic of China ("PRC"). We gave interested parties an opportunity to comment on the *Preliminary Results*, and based upon our analysis of the comments and information received, we made changes to the margin calculation for these final results. The final dumping margin is listed below in the "Final Results of the Administrative Review" section of this notice. The period of review ("POR") is January 1, 2014, through December 31, 2014.

DATES: Effective August 25, 2016.

FOR FURTHER INFORMATION CONTACT: Paul Walker, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone 202.482.0413.

SUPPLEMENTARY INFORMATION:

Background

The Department published the *Preliminary Results* on February 10, 2015.[1] This review covers one respondent, Pacific Accelerator Limited ("PAL").[2] Between July 15–20, 2016, PAL and Petitioner submitted case and rebuttal briefs.[3] On August 3, 2016, the Department held a hearing limited to issues raised in the case and rebuttal briefs.

Scope of the Order

Imports covered by this order are shipments of potassium permanganate, an inorganic chemical produced in free-flowing, technical, and pharmaceutical grades. Potassium permanganate is currently classifiable under item 2841.61.00 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Although the HTSUS item number is provided for convenience and customs purposes, the written description of the merchandise remains dispositive.

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[1] *See Potassium Permanganate from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2013*, 81 FR 7751 (February 16, 2016) ("*Preliminary Results*").

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 79 FR 11401 (February 28, 2014).

[3] *See* PAL's July 15, 2016 and July 20, 2016 submissions; Petitioner's July 15, 2016 and July 20, 2016 submissions.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties in this review are addressed in the I&D Memo.[4] A list of the issues which parties raised is attached to this notice as an appendix. The I&D Memo is a public document and is on file in the Central Records Unit ("CRU"), Room B8024 of the main Department of Commerce building, as well as electronically *via* Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System ("ACCESS"). ACCESS is available to registered users at *http://access.trade.gov* and to all users in the CRU. In addition, a complete version of the I&D Memo can be accessed directly on the Internet at *http://enforcement.trade.gov/frn/index.html.* The signed I&D Memo and the electronic version are identical in content.

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding our *Preliminary Results*, and for the reasons explained in the I&D Memo, we revised the margin calculation for PAL. Specifically, we made an adjustment to PAL's U.S. price for the irrecoverable value-added tax which was not rebated to PAL's PRC producer upon the export of the subject merchandise.

Final Results of the Review

The dumping margins for the final results of this administrative review are as follows:

Exporter	Weighted-average margin (dollars/kilogram) [5]
PAL	2.88

Disclosure

The Department will disclose calculations performed for these final results to the parties within five days of the date of publication of this notice, in accordance with section 351.224(b) of the Department's regulations.

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b), the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of the final results of this administrative review.

In accordance with 19 CFR 351.212(b)(1), we are calculating importer- (or customer-) specific assessment rates for the merchandise subject to this review. For assessment purposes, we calculated a per-unit rate for each importer (or customer) by dividing the total dumping margins for reviewed sales to that party by the total sales quantity associated with those transactions. We will direct CBP to assess the resulting per-unit rate against the entered quantity of the subject merchandise.[6] We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer- (or customer-) specific assessment rate is above *de minimis.* Where an importer- (or customer-) specific assessment rate is zero or *de minimis*, we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results, as provided for by section 751(a)(2)(C) of the Act: (1) For the exporter listed above, the cash deposit rate will be the rate established in the final results of review; (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be that for the PRC-wide entity, which is 128.94 percent;[7] and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. The cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers Regarding the Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order ("APO") of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this administrative review and notice in accordance with sections 751(a)(l) and 777(i) of the Act.

Dated: August 15, 2016

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Final Decision Memorandum

Summary
Background
Scope of the Order
Discussion of the Issues
Comment I Surrogate Country
Comment II Surrogate Value for Manganese Ore/Manganese Dioxide
Comment III Surrogate Financial Ratios
Comment IV Treatment of Value Added Tax
Comment V Application of Adverse Facts Available to PAL
Recommendation

[FR Doc. 2016–20423 Filed 8–24–16; 8:45 am]

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[4] *See* Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Potassium Permanganate from the People's Republic of China: Issues and Decision Memorandum for the Final Results," dated concurrently with and hereby adopted by this notice ("I&D Memo").

[5] Consistent with Comment V in the I&D Memo, the Department has determined that it will calculate per-unit assessment and cash deposit rates.

[6] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification*, 77 FR 8101, 8103 (February 14, 2012).

[7] *See Potassium Permanganate from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 59 FR 26625 (May 23, 1994).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE727

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Maintenance, Repair, and Decommissioning of a Liquefied Natural Gas Facility off Massachusetts

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS has received an application from Neptune LNG LLC (Neptune) for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to maintenance, repair, and decommissioning activities at its liquefied natural gas (LNG) deepwater port (Port) off the coast of Massachusetts. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to Neptune to take, by Level B harassment only, fourteen species of marine mammals during the specified activity.

DATES: Comments and information must be received no later than September 26, 2016.

ADDRESSES: Comments on the application should be addressed to Jolie Harrison, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East West Highway, Silver Spring, MD 20910. The mailbox address for providing email comments is *ITP.DALY@noaa.gov.* NMFS is not responsible for email comments sent to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 25 megabyte file size.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm* without change. All personally identifiable information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

An electronic copy of the application may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* The following associated documents are also available at the same Internet address: Biological Opinion on the Effects of the Maritime Administration's (MARAD) issuance of a license to Neptune to own and operate a LNG deepwater port off the coast of Massachusetts on Threatened and Endangered Species (NMFS, 2010) and a list of references used in this document. The MARAD and U.S. Coast Guard (USCG) Final Environmental Impact Statement (EIS) is available for viewing at *http://www.regulations.gov* by entering the search words "Neptune LNG."

FOR FURTHER INFORMATION CONTACT: Jaclyn Daly, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS' review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild ("Level A harassment"); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering ("Level B harassment").

Summary of Request

NMFS received an application on May 28, 2016, from Neptune for the taking, by harassment, of marine mammals incidental to maintenance, repair, and decommissioning activities, at its Port facility in Massachusetts Bay off the coast of Massachusetts. NMFS reviewed Neptune's application and requested clarification on some portions. After addressing comments from NMFS, Neptune modified its application and submitted a revised application on August 11, 2016. The August 11, 2016, application is the one available for public comment (see **ADDRESSES**) and considered by NMFS for this proposed IHA.

NMFS has issued several incidental harassment authorizations for the take, by Level B harassment only, of marine mammals to Neptune. NMFS issued a one-year IHA in June 2008, for the construction of the DWP (73 FR 33400 [June 12, 2008), which expired on June 30, 2009. NMFS issued a second one-year IHA to Neptune for the completion of construction and beginning of Port operations on June 26, 2009 (74 FR 31926 [July 6, 2009]). NMFS issued a third 1-year IHA (75 FR 41440 [July 16, 2010]) for ongoing operations followed by a five-year rulemaking and Letter of Authorization (LOA) 76 FR 34157 [June 13, 2011]), which expired on July 10, 2016. Although Neptune intended to operate the port for over 25 years, changes in the natural gas market have resulted in the company halting production operations. During the period of this proposed IHA, Neptune intends to decommission the port in its entirety and conduct any unscheduled maintenance activities, if needed, prior to decommissioning.

The Neptune Port is located approximately 22 miles (mi) (35 kilometers (km)) northeast of Boston, Massachusetts, in Federal waters approximately 260 feet (ft) (79 meters (m)) in depth. Take of marine mammals may occur from dynamic positioning (DP) vessel thruster use, including dive support vessels (DSVs) and potentially one heavy lift vessel (HLV), while maneuvering (*e.g.,* docking, undocking, and occasional weathervaning (turning of a vessel at anchor from one direction to another under the influence of wind or currents) during port maintenance, repair, and decommissioning. Neptune has requested authorization to take the following 14 marine mammal species by Level B harassment: North Atlantic right whale (*Eubalaena glacialis*), fin whale (*Balaenoptera physalus*), humpback whale (*Megaptera novaeangliae*), minke whale (*Balaenoptera acutorostrata*), sei whale (*Balaenoptera boreali*), Atlantic white-sided dolphin (*Lagenorhynchus acutus*), long-finned pilot whale (*Globicephala melas*), harbor porpoise (*Phocoena phocoena*), bottlenose dolphin (*Tursiops truncatus*), short beaked common dolphin (*Delphinus delphis*), Risso's dolphin (*Grampus griseus*), killer whale (*Orcinus orcus*), harbor seal (*Phoca vitulina*), and grey seal (*Halichoerus grypus*). NMFS has preliminarily determined to authorize take, by Level B harassment only, of these species incidental to DP vessel thruster use during maintenance, repair, and decommissioning activities.

Description of the Specified Activity

Overview

The Neptune Port began operations in 2009–2010, with the intention to import LNG into the New England region. The Port consists of a submerged buoy system to dock specifically designed LNG carriers approximately 22 mi (35 km) northeast of Boston, Massachusetts, in Federal waters approximately 125–250 ft (38–76 m) in depth. It is located west (*i.e.,* inshore) of and adjacent to the Stellwagen Bank National Marine Sanctuary (NMS). The Port consists of two mooring and unloading buoys separated by approximately 2.1 mi (3.4 km) (also known as the north and south buoy) and a pipeline that receives natural gas from "shuttle and regasification vessels" (SRVs), through a flexible riser that connects to a 24-inch (in) subsea flowline and ultimately into a 24-in gas transmission line. This gas transmission line connects to the existing 30-in Algonquin HubLine gas pipeline. A hot tap valve (herein after "hot tap") unit used to control gas flow from the Algonquin pipeline to Neptune's gas transmission line is located inshore of the buoys in water approximately 122 ft (37 m). The locations of the Neptune port facilities, including the north buoy, south buoy and hot tap are shown in Figure 2–1 in Neptune's application (see **ADDRESSES**). All decommissioning and unscheduled maintenance and repair work will take place at the north and south buoys and at the hot tap in succession with limited transit between locations.

Dates and Duration

Decommissioning will occur for up to 70 days between May 1 and November 30, 2017. Unscheduled maintenance and repair work may occur prior to decommissioning, if needed, and last up to 14 days.

Detailed Description of Activities

Maintenance, repair, and decommissioning of the Port will require docking, undocking, and occasional weathervaning of DP vessels at the north buoy, south buoy, and hot tap via the use of bow and stern thrusters. Operation and specifications of DP vessels is provided in the "Vessel Activity" section below. For purposes of this IHA, the activity that may result in the take, by Level B harassment, of marine mammals is limited to use of these thrusters. A summary of the type of work performed during maintenance, repair, and decommissioning requiring vessel operations is also summarized below; however, NMFS does not anticipate incidental take of marine mammals as a result of the actual underwater work (see Neptune's application for a more detailed description of this work).

Maintenance and Repair

At this time, Neptune does not anticipate maintenance or repair of Port equipment will be necessary (the Port is not currently operating); however, they are requesting authorization of take incidental to thruster use during maintenance and repair should an unanticipated issue arise with port equipment prior to decommissioning. Unscheduled maintenance and repair activities requiring limited excavation to access the pipeline, or cathodic protection maintenance, are authorized by the Federal Energy Regulatory Commission (FERC). Unplanned maintenance and repair would be relatively minor and of short duration. Example unscheduled maintenance activities may include repair of flange or valve leaks, replacing faulty pressure transducers, or unscheduled maintenance on valves. Neptune may use a remotely operated underwater vehicle (ROV) to perform these tasks. These minor unscheduled maintenance and repair activities will be completed within a few days to two weeks, depending on the nature of the problem.

Should any unplanned maintenance be required, a DSV would be the primary vessel used to complete the activities in the timeliest manner. The category of DSV and corresponding support vessels would be dictated by the type of work required, the water depth at the work location, vessel availability, and expected duration of the maintenance or repair.

Decommissioning

Neptune intends to decommission the Port in its entirety. Decommissioning involves seven major steps: Isolation and closure of hot tap and removal of tie-in spool; pipeline decommissioning and abandonment; disconnection and removal of risers and umbilicals, and submerged turret loading (STL) buoys; covering suction piles used as anchoring/mooring with trawl protector; removal of mooring lines (anchor chain and wire rope); removal of pipeline end maninfolds (PLEMs) and hot tap; and removal of two seafloor position transponders (one at each buoy). All recovery of decommissioned equipment would be done using a crane aboard the DSV and parts staged on the anchored barge to be taken to shore via a tug. Neptune's application provides more detail regarding these activities. NMFS has preliminarily determined only the use of thrusters from vessels necessary to perform the work has the potential to result in the take of marine mammals, by Level B harassment.

Vessel Activity

The planned scenario for the duration of all proposed activities would include the mobilization of a DSV, tug, an anchored barge, and intermittent use of a crew vessel with the DSV being a DP vessel. Two types of DP vessels may be used to support Port maintenance, repair, and decommissioning: A DSV and a HLV. Only one DSV or HLV vessel is expected to be working at any one time. However, in the unlikely event that two DSVs (or one DSV and one HLV) are necessary at the same time, they would remain at least 1000 m from each another. The specifications of the HLV are similar to that of the DSV and would be performing the same duties as a DSV. The DP vessel would likely be 120 m in length and equipped with two 1,500 kW forward thrusters and one 1,500 kilowatt (kW) aft thruster (total 4,500 kW). Neptune would operate the thrusters for up 24 hours per day at 50 percent load or less for a maximum 10 weeks. Proxy DSV and HLV vessels used in Neptune's acoustic modeling, as described in Table 1–4 of Neptune's application, were 107 m and 144 m, respectively, with corresponding total thruster power of 3,752 kW and 4,600 kW. For comparison, previous incidental take authorizations included take of marine mammals based on sound source verification measurements from thrusters on a shuttle regasification vessel (SVRs) planned for use during Port operation. The SVR was 280 m in length and equipped with two 2,000-kW bow thrusters and two 1,200-kW stern thrusters (total 6,400 kW). During the measurements, the SRV operated thrusters at 100 percent load as this was the predicted scenario during Port operation.

In general, the DSV will transit to either the STL buoy or PLEM and complete all work at the site prior to moving to the next location. The DSV would operate in dynamic positioning mode and would support all diving and ROV operations required to perform the work. The support tug will anchor the barge and would occasionally be required for barge handling activities when equipment transport and/or staging are required. The crew/supply vessel would be used intermittently for personnel and supply transfers. A survey vessel would be used for a brief period of time (no more than five days) at the end of the project to perform an "as-left" survey.

Description of Marine Mammals in the Area of the Specified Activity

Massachusetts Bay (as well as the entire Atlantic Ocean) hosts a diverse assemblage of marine mammals. Table 3–1 in Neptune's application outlines 20 marine mammal species with distributions or sighting records within the general activity region. However, six are very rare or unlikely to inhabit the geographic range which many ensonified by the proposed activity area and therefore are not expected to be affected at any level by the proposed activities. These species include: Blue whale (*Balaenoptera musculus*), striped dolphin (*Stenella coeruleoalba*), Atlantic white-sided dolphin (*Lagenorhynchus acutus*), sperm whale (*Physeter macrocaphalus*), hooded seal (*Cystophora cristata*), and harp seal (*Phoca groenlandica*). Blue and sperm whales are not commonly found in Massachusetts Bay with blue whale most commonly seen off the Canada coast. The sperm whale is generally a deepwater animal, and its distribution off the Northeastern United States is concentrated around the 13,280 ft (4,048 m) depth contour, with sightings extending offshore beyond the 6,560 ft (2,000 m) depth contour. Sperm whales can also be seen in shallow water south of Cape Cod from May to November. Harp and hooded seals are seasonal visitors from much further north, seen mostly in the winter and early spring. Prior to 1990, harp and hooded seals were sighted only very occasionally in the Gulf of Maine, but recent sightings suggest increasing numbers of these species now visit these waters. Juveniles of a third seal species, the ringed seal, are seen on occasion as far south as Cape Cod in the winter, but this species is considered to be quite rare in these waters. Due to the rarity of these species in the project area, NMFS is not proposing to authorize take, by harassment, of these species or stocks and; therefore, they are not discussed further in this proposed IHA notice. The bottlenose dolphin and killer whale are also unlikely to occur within the proposed activity area. However, given their wide distribution and transient behavior, they remain in the group of species potentially affected by proposed activities.

Therefore, NMFS proposes to issue an IHA for Level B harassment for the following 14 species: North Atlantic right whale; fin whale; humpback whale; minke whale; sei whale; harbor porpoise; bottlenose dolphin; killer whale; long-finned pilot whale; Atlantic white-sided dolphin; short beaked common dolphin; Risso's dolphin; grey seal; and harbor seal (Table 1).

TABLE 1—SPECIES LIKELY TO OCCUR WITHIN THE PROJECT AREA

[E = endangered, D = depleted, NL = not listed, ND = not depleted, unk = unknown]

Common name	Scientific name	Stock	Status	Estimated population (Waring et al., 2015)	Occurrence
North Atlantic right whale	*Eubalaena glacialis*	Western Atlantic	E, D	476	occasional.
Fin whale	*Balaenoptera physalus*	Western North Atlantic	E,D	1,618	occasional.
Humpback whale	*Megaptera novaeangliae*	Gulf of Maine	E,D	823	occasional.
Minke whale	*Balaenoptera acutorostrata*	Canadian East Coast	NL, ND	20,741	occasional.
Sei whale	*Balaenoptera borealis*	Novia Scotia	E,D	357	occasional.
Atlantic white-sided dolphin	*Lagenorhynchus acutus*	Western North Atlantic	NL, ND	48,819	occasional.
Long-finned pilot whale	*Globicephala melas*	Western North Atlantic	NL, ND	26,535	occasional.
Harbor porpoise	*Phocoena phocoena*	Gulf of Maine/Bay of Fundy	NL, ND	79,883	not common.
Bottlenose dolphin	*Tursiops truncatus*	Western North Offshore Atlantic.	NL, ND	77,532	not common.
Short beaked common dolphin	*Delphinus delphis*	Western North Atlantic	NL, ND	173,486	occasional.
Risso's dolphin	*Grampus griseus*	Western North Atlantic	NL, ND	18,250	not common.
Killer whale	*Orcinus orca*	Western North Atlantic	NL, ND	unk	not common.
Harbor seal	*Phoca vitulina*	Western North Atlantic	NL, ND	75,834	occasional.
Grey seal	*Halichoerus grypus*	Western North Atlantic	NL, ND	unk	occasional.

The North Atlantic right, fin, humpback, and sei, whales are listed as endangered under the Endangered Species Act (ESA) and as depleted under the MMPA. Certain stocks or populations of killer whales are listed as endangered under the ESA or depleted under the MMPA; however, none of those stocks or populations occurs in the project area. All other species are not listed under the ESA nor considered depleted under the MMPA. A brief description of distribution and abundance of species potentially taken by the specified activity is provided below. Information within these summaries is taken from NMFS stock assessment reports, as reviewed in Waring *et al.* (2015).

North Atlantic Right Whale

North Atlantic right whales are distributed widely across the southern Gulf of Maine in spring with highest abundance located over the deeper waters (100 to 160 m, or 328 to 525 ft, isobaths) on the northern edge of the Great South Channel (GSC) and deep waters (100–300 m, 328–984 ft) parallel to the 100 m (328 ft) isobath of northern Georges Bank and Georges Basin. High abundance was also found in the shallowest waters (<30 m, <98 ft) of Cape Cod Bay (CCB), over Platts Bank and around Cashes Ledge. Lower relative abundance is estimated over deep-water basins including Wilkinson Basin, Rodgers Basin, and Franklin Basin. In the summer months, right whales move almost entirely away from the coast to deep waters over basins in the central Gulf of Maine (Wilkinson Basin, Cashes Basin between the 160 and 200 m (525 and 656 ft) isobaths and north of Georges Bank (Rogers, Crowell, and Georges Basins). Highest abundance is found north of the 100 m (328 ft) isobath at the GSC and over the deep slope waters and basins along the northern edge of Georges Bank. The waters between Fippennies Ledge and Cashes Ledge are also estimated as high-use areas. In the fall months, right whales are sighted infrequently in the Gulf of Maine, with highest densities over Jeffreys Ledge and over deeper waters near Cashes Ledge and Wilkinson Basin. In winter, CCB, Scantum Basin, Jeffreys Ledge, and Cashes Ledge are the main high-use areas. The Stellwagen Bank NMS, located just east of the Port, does not appear to support a high abundance of right whales; sightings are reported for all four seasons, albeit at low relative abundance. The highest sighting rate within Stellwagen Bank NMS occurs along the southern edge of the Bank.

Right whales frequent Massachusetts and CCB from December through July (NMFS, 2010). Neptune acoustically detected right whales in greatest abundance near the Port in March and April since beginning their long-term acoustic monitoring plan developed during issuance of previous incidental take authorizations. As such, NMFS set forth conditions in previous incidental take authorizations and its 2010 Biological Opinion to Neptune to conduct all work from May 1 to November 30, annually, to the greatest extent practicable, to avoid times when right whales are most abundant.

As reviewed in Waring *et al.* (2015), a review of the North Atlantic right whale photo-ID recapture database as it existed on October 20, 2014, indicated that 476 individually-recognized whales in the catalog were known to be alive during 2011. This number represents a minimum population size. The minimum number alive population index calculated from the individual sightings database for the years 1990–2011 suggests a positive and slowly accelerating trend in population size. These data reveal a significant increase in the number of catalogued whales with a geometric mean growth rate for the period of 2.8 percent.

For the period 2009 through 2013, the minimum rate of annual human-caused mortality and serious injury to right whales averaged 4.3 per year. This is derived from two components: (1) Incidental fishery entanglement records at 3.4 per year, and (2) ship strike records at 0.9 per year. The stock assessment report for this stock (Waring *et al.*, 2015) sets the potential biological removal (PBR) level at 0.9; therefore, any mortality or serious injury for this stock can be considered significant. The Western North Atlantic stock is considered strategic by NOAA because the average annual human-related mortality and serious injury exceeds PBR, and because the North Atlantic right whale is an endangered species.

Humpback Whale

The highest abundance for humpback whales is distributed primarily along a relatively narrow corridor following the 100 m (328 ft) isobath across the southern Gulf of Maine from the northwestern slope of Georges Bank, south to the GSC, and northward alongside Cape Cod to Stellwagen Bank and Jeffreys Ledge. The relative abundance of whales increases in the spring with the highest occurrence along the slope waters (between the 40 and 140 m (131 and 459 ft) isobaths) off Cape Cod and Davis Bank, Stellwagen Basin and Tillies Basin and between the 50 and 200 m (164 and 656 ft) isobaths along the inner slope of Georges Bank. High abundance was also estimated for the waters around Platts Bank. In the summer months, abundance increases markedly over the shallow waters (<50 m, or <164 ft) of Stellwagen Bank, the waters (100–200 m, 328–656 ft) between Platts Bank and Jeffreys Ledge, the steep slopes (between the 30 and 160 m isobaths, 98 and 525 ft isobaths) of Phelps and Davis Bank north of the GSC towards Cape Cod, and between the 50 and 100 m (164 and 328 ft) isobath for almost the entire length of the steeply sloping northern edge of Georges Bank. This general distribution pattern persists in all seasons except winter when humpbacks remain at high abundance in only a few locations including Porpoise and Neddick Basins adjacent to Jeffreys Ledge, northern Stellwagen Bank and Tillies Basin, and the GSC. The minimum population estimate of Gulf of Maine, formerly western North Atlantic, humpback whales is 823 animals (Waring *et al.*, 2015). Current data suggest that the Gulf of Maine humpback whale stock is steadily increasing in size, which is consistent with an estimated average trend of 3.1% in the North Atlantic population overall for the period 1979–1993.

Fin Whale

Spatial patterns of habitat utilization by fin whales are very similar to those of humpback whales. Spring and summer high-use areas follow the 100 m (328 ft) isobath along the northern edge of Georges Bank (between the 50 and 200 m, 164 and 656 ft, isobaths), and northward from the GSC (between the 50 and 160 m, 164 and 525 ft, isobaths). Waters around Cashes Ledge, Platts Bank, and Jeffreys Ledge are all high-use areas in the summer months. Stellwagen Bank is a high-use area for fin whales in all seasons, with highest abundance occurring over the southern Stellwagen Bank in the summer months. In fact, the southern portion of Stellwagen Bank NMS is used more frequently than the northern portion in all months except winter, when high abundance is recorded over the northern tip of Stellwagen Bank. In addition to Stellwagen Bank, high abundance in winter is estimated for Jeffreys Ledge and the adjacent Porpoise Basin (100 to 160 m, 328 to 525 ft isobaths), as well as Georges Basin and northern Georges Bank. The best abundance estimate available for the western North Atlantic fin whale stock is 1,618 and is based on 2011 NOAA shipboard surveys (Waring *et al.*, 2015). The minimum population estimate for the western North Atlantic fin whale is 1,234. A trend analysis has not been conducted for this stock.

Minke Whale

Like other piscivorus baleen whales, highest abundance for minke whale is strongly associated with regions between the 50 and 100 m (164 and 328 ft) isobath, but with a slightly stronger preference for the shallower waters along the slopes of Davis Bank, Phelps Bank, GSC, and Georges Shoals on Georges Bank. Minke whales are sighted in Stellwagen Bank NMS in all seasons, with highest abundance estimated for the shallow waters (approximately 40 m, 131 ft) over southern Stellwagen Bank in the summer and fall months. Platts Bank, Cashes Ledge, Jeffreys Ledge, and the adjacent basins (Neddick, Porpoise, and Scantium) also support high relative abundance. Very low densities of minke whales remain throughout most of the southern Gulf of Maine in winter. The best estimate of abundance for the Canadian East Coast stock of minke whales, which occurs from the western half of the Davis Strait to the Gulf of Mexico, is 20,741 animals with a minimum estimate of 16,199 individuals (Waring *et al.*, 2015). A trend analysis has not been conducted for this stock.

Long-finned Pilot Whale

The long-finned pilot whale is generally found along the edge of the continental shelf at a depth of 100–1,000 m (328–3,280 ft), choosing areas of high relief or submerged banks in cold or temperate shoreline waters. This species is split into two subspecies: The Northern and Southern subspecies. The Southern subspecies is circumpolar with northern limits of Brazil and South Africa. The Northern subspecies, which could be encountered during operation of the Port facility, ranges from North Carolina to Greenland. In the western North Atlantic, long-finned pilot whales are pelagic, occurring in especially high densities in winter and spring over the continental slope, then moving inshore and onto the shelf in summer and autumn following squid and mackerel populations. They frequently travel into the central and northern Georges Bank, GSC, and Gulf of Maine areas during the summer and early fall (May and October). Based on summer 2011 surveys covering waters from central Virginia to the lower Bay of Fundy, the best available estimate for long-finned pilot whales in the western North Atlantic is 5,636 with a minimum population estimate of 3,464 individuals (Waring *et al.*, 2015). Currently, there are insufficient data to determine population trends for the long-finned pilot whale.

Sei Whale

The sei whale is the least likely of all the baleen whale species to occur near the Port. However, four sei whales were sighted by Neptune's protected species observers (PSOs) during the construction phase (ECOES 2010). The Nova Scotia stock of sei whales ranges from the continental shelf waters of the Northeastern United States and extends northeastward to south of Newfoundland. The southern portion of the species range during spring and summer includes the northern portions of the U.S. Atlantic Exclusive Economic Zone (EEZ): The Gulf of Maine and Georges Bank. Spring is the period of greatest abundance in U.S. waters, with sightings concentrated along the eastern margin of Georges Bank and into the Northeast Channel area and along the southwestern edge of Georges Bank in the area of Hydrographer Canyon. The best estimate of abundance for the Nova Scotia stock is 357 with a minimum of 236 individuals. However, this estimate is considered low and limited given the known range of the sei whale (Waring *et al.*, 2015). There are insufficient data to determine population trends for this species.

Atlantic White-Sided Dolphin

In spring, summer and fall, Atlantic white-sided dolphins are widespread throughout the southern Gulf of Maine, with the high-use areas widely located on either side of the 100 m (328 ft) isobath along the northern edge of Georges Bank, and north from the GSC to Stellwagen Bank, Jeffreys Ledge, Platts Bank, and Cashes Ledge. In spring, high-use areas exist in the GSC, northern Georges Bank, the steeply sloping edge of Davis Bank, and Cape Cod, southern Stellwagen Bank, and the waters between Jeffreys Ledge and Platts Bank. In summer, there is a shift and expansion of habitat toward the east and northeast. High-use areas occur along most of the northern edge of Georges Bank between the 50 and 200 m (164 and 656 ft) isobaths and northward from the GSC along the slopes of Davis Bank and Cape Cod. High sightings are also recorded over Truxton Swell, Wilkinson Basin, Cashes Ledge and the bathymetrically complex area northeast of Platts Bank. High sightings of white-sided dolphin are recorded within Stellwagen Bank NMS in all seasons, with highest density in summer and most widespread distributions in spring located mainly over the southern end of Stellwagen Bank. In winter, high sightings were recorded at the northern tip of Stellwagen Bank and Tillies Basin. The best available current abundance estimate for white-sided dolphins in the western North Atlantic stock is 48,819, resulting from a June–August 2011 survey with a minimum population of 30,403 individuals (Waring *et al.*, 2015). A trend analysis has not been conducted for this species.

Killer Whale, Common Dolphin, Bottlenose Dolphin, Risso's Dolphin, and Harbor Porpoise

Although these five species are some of the most widely distributed small cetacean species in the world, they are not commonly seen in the vicinity of the project area in Massachusetts Bay. The total number of killer whales off the eastern U.S. coast is unknown, and present data are insufficient to calculate a minimum population estimate or to determine the population trends for this stock. The best estimate of abundance for the western North Atlantic stock of short-beaked common dolphin is 173,486 with a minimum of 112,531 individuals; a trend analysis has not been conducted for this species (Waring *et al.*, 2015). There are several stocks of bottlenose dolphins found along the eastern U.S. coast from Maine to Florida. The stock that may occur in the area of the Port is the western North Atlantic offshore stock of bottlenose dolphins. The best population estimate of bottlenose dolphins for the stock is 77,532 individuals with a minimum of 56,053 individuals (Waring *et al.*, 2015). There are insufficient data to determine the population trend for this stock. The best estimate of abundance for the western North Atlantic stock of Risso's dolphins is 18,250 with a minimum of 12,619 individuals generated from shipboard and aerial survey conducted between central Florida and the lower Bay of Fundy during June-August 2011 (Waring *et al.*, 2015). There are insufficient data to determine the population trend for this stock. The best estimate of abundance for the Gulf of Maine/Bay of Fundy stock of harbor porpoise is 79,883 with a minimum of 61,415 individuals (Waring *et al.*, 2015). A trend analysis has not been conducted for this species.

Harbor and Gray Seals

In the U.S. western North Atlantic, both harbor and gray seals are usually found from the coast of Maine south to southern New England and New York. Along the southern New England and New York coasts, harbor seals occur seasonally from September through late May. In recent years, their seasonal interval along the southern New England to New Jersey coasts has increased. In U.S. waters, harbor seal breeding and pupping normally occur in waters north of the New Hampshire/Maine border, although breeding has occurred as far south as Cape Cod in the early part of the 20th century. The best estimate of abundance for the western North Atlantic stock of harbor seals is 75,834 with a minimum of 66,884 individuals (Waring *et al.*, 2015). A trend analysis has not been conducted for this stock (Waring *et al.*, 2015).

Although gray seals are often seen off the coast from New England to Labrador, within U.S. waters, only small numbers of gray seals have been observed pupping on several isolated islands along the Maine coast and in Nantucket-Vineyard Sound, Massachusetts. Present data are insufficient to calculate the minimum population estimate for U.S. waters; however, in March 2011, a maximum count of 15,756 was obtained in southeastern Massachusetts coastal waters (Waring *et al.*, 2015). Gray seal abundance is likely increasing in the U.S. Atlantic EEZ, but the rate of increase is unknown (Waring *et al.*, 2015).

Potential Effects of the Specified Activity on Marine Mammals

This section includes a summary and discussion of the ways that components (*i.e.*, thruster use) of the specified activity, including mitigation, may impact marine mammals and their habitat. The "Estimated Take by Incidental Harassment" section later in this document will include a quantitative analysis of the number of individuals that are expected to be taken by this activity. The "Negligible Impact Analysis" section will include the analysis of how this specific activity will impact marine mammals and will consider the content of this section, the "Estimated Take by Incidental Harassment" section and the "Proposed Mitigation" section to draw conclusions regarding the likely impacts of this activity on the reproductive success or survivorship of individuals and from that on the affected marine mammal populations or stocks.

When considering the influence of various kinds of sound on the marine environment, it is necessary to understand that different kinds of marine life are sensitive to different frequencies of sound. Based on available behavioral data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data, NOAA's Acoustic Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (NMFS, 2016) designate "marine mammal hearing groups" for marine mammals and estimate the lower and upper frequencies of hearing. The groups and the associated frequencies are indicated below, but it is important to note animals are less sensitive to sounds at the outer edge of their functional range and most sensitive to sounds of frequencies within a smaller range somewhere in the middle of their functional hearing range:

- Low frequency cetaceans (13 species of mysticetes): Generalized hearing range is 7 hertz (Hz) to 35 kilohertz (kHz);
- Mid-frequency cetaceans (32 species of dolphins, six species of larger toothed whales, and 19 species of beaked and bottlenose whales): Generalized hearing range is 150 Hz to 160 kHz;
- High frequency cetaceans (eight species of true porpoises, six species of river dolphins, Kogia, the franciscana, and four species of cephalorhynchids): Generalized hearing range is 275 Hz to 160 kHz; and
- Phocid pinnipeds in water: Generalized hearing range is 50 Hz to 86 kHz; and
- Otariid pinnipeds in water: Functional hearing is estimated to occur between approximately 60 Hz and 39 kHz.

As mentioned previously in this document, 14 marine mammal species (12 cetacean and two pinniped species) are likely to occur near the Port. Of the 12 cetacean species likely to occur in Neptune's project area, five are classified as low frequency cetaceans (*i.e.*, North Atlantic right, humpback, fin, minke, and sei whales), six are classified as mid-frequency cetaceans (*i.e.*, killer and pilot whales and bottlenose, common, Risso's, and Atlantic white-sided dolphins), and one is classified as a high-frequency cetacean (*i.e.*, harbor porpoise) (Southall *et al.*, 2007). Both seal species potentially taken, by harassment, are phocids. The potential effects of the specified activity on marine mammals has been reviewed in the previous incidental take authorizations to Neptune (*e.g.*, 75 FR 80260 [December 21, 2010]) as well as those proposed for the nearby Northeast Gateway LNG Port (*e.g.*, 80 FR 72688 [November 20, 2015]).

When analyzing the auditory effects of noise exposure, it is often helpful to broadly categorize noise as either impulse or non-impulsive. Impulsive sound is typically transient, brief (less than 1 second), broadband, and consists of high peak sound pressure with rapid rise time and rapid decay. Impulsive sounds can occur in repetition or as a single event. Non-impulsive sound is characterized as broadband, narrowband, or tonal, brief or prolonged, continuous or intermittent, and does not have high peak sound pressure with rapid rise times (NMFS, 2016). Further, continuous noise is defined as a sound whose sound pressure level remains above ambient sound during the observation period (ANSI, 2005). DP vessel thrusters produce a non-impulsive, continuous noise. Marine mammals may undergo behavioral modifications rising to the level of take when exposed to elevated sound levels produced by thrusters during maneuvering of the DSV or HLV while docking and undocking and occasional weathervaning during maintenance, repair, and decommissioning activities. The potential effects of sound from thruster use include, but are not limited to, one or more of the following: No effect; masking; behavioral disturbance; non-auditory physical effects; and, temporary hearing impairment (Richardson *et al.*, 1995; Southall *et al.*, 2007). For reasons discussed later in this document, it is unlikely that there would be any cases of temporary or permanent hearing impairment resulting from these activities. As outlined in previous NMFS documents, the effects of noise on marine mammals are highly variable and can be categorized as follows (based on Richardson *et al.*, 1995):

(1) The noise may be too weak to be heard at the location of the animal (*i.e.*, lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both);

(2) The noise may be audible but not strong enough to elicit any overt behavioral response;

(3) The noise may elicit reactions of variable conspicuousness and variable relevance to the well being of the marine mammal; these can range from temporary alert responses to active avoidance reactions such as vacating an area at least until the noise event ceases but potentially for longer periods of time;

(4) Upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent, and unpredictable in occurrence, and associated with situations that a marine mammal perceives as a threat;

(5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise;

(6) If mammals remain in an area because it is important for feeding, breeding, or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and

(7) Very strong sounds have the potential to cause a temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing

impairment. In addition, intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration and other functions. This trauma may include minor to severe hemorrhage.

Masking

Underwater noise, whether of natural or anthropogenic origin, has the ability to interfere with the way in which marine mammals receive acoustic signals used for communication, social interaction, foraging, navigation, etc. (Erbe *et al.*, 2016). When communication signals occur near the noise band of the source (in this case, a low frequency source like thrusters), communication space of marine mammals can be reduced (*e.g.*, Clark *et al.*, 2009) and those animals may exhibit increased stress levels (*e.g.*, Foote *et al.*, 2004; Holt *et al.*, 2009). Background ambient noise often interferes with or masks the ability of an animal to detect a sound signal even when that signal is above its absolute hearing threshold.

Natural ambient noise includes contributions from wind, waves, precipitation, other animals, and (at frequencies above 30 kHz) thermal noise resulting from molecular agitation (Richardson *et al.*, 1995) making the sea usually noisy, even in the absence of manmade sounds. As such, marine mammals have evolved systems and behavior that function to reduce the impacts of masking. Structured signals, such as the echolocation click sequences of small toothed whales, may be readily detected even in the presence of strong background noise because their frequency content and temporal features usually differ strongly from those of the background noise (Au and Moore, 1988, 1990). There is evidence some toothed whales can increase amplitude and shift dominant frequencies of their echolocation and communication signals to compensate for increased ocean noise (Au *et al.*, 1985; Holt *et al.*, 2011; Scheifele *et al.*, 2005). In addition, the sound localization abilities of marine mammals suggest that, if signal and noise come from different directions, masking would not be as severe as the usual types of masking studies might suggest (Richardson *et al.*, 1995).

The introduction of strong sounds into the sea at frequencies important to marine mammals increases the severity and frequency of occurrence of masking. Recent science suggests that low frequency ambient sound levels have increased by as much as 20 decibels (dB) (more than three times in terms of sound pressure level [SPL]) in the world's ocean from pre-industrial periods, and most of these increases are from distant shipping (Hildebrand, 2009).

Unlike threshold shift, masking can potentially affect the species at population, community, or even ecosystem levels, as well as individual levels. Masking affects both senders and receivers of the signals and could have long-term chronic effects on marine mammal species and populations; however, quantitative data supporting this is lacking. Regardless, Neptune's use of DP thrusters would contribute elevated noise levels, thus increasing severity of masking by nearby animals.

Disturbance

Exposure of marine mammals to certain sounds could lead to behavioral disturbance (Richardson *et al.*, 1995), such as: Changing durations of surfacing and dives, number of blows per surfacing, or moving direction and/or speed; reduced/increased vocal activities; changing/cessation of certain behavioral activities (such as socializing or feeding); visible startle response or aggressive behavior (such as tail/fluke slapping or jaw clapping); avoidance of areas where noise sources are located; and/or flight responses (*e.g.*, pinnipeds flushing into water from haulouts or rookeries).

The onset of behavioral disturbance from anthropogenic noise depends on both external factors (characteristics of noise sources and their paths) and the receiving animals (hearing, motivation, experience, demography) and is also difficult to predict (Southall *et al.*, 2007). Similarly, the biological significance of many of these behavioral disturbances, especially short-term, mild reactions, are not well documented. The consequences of behavioral modification are expected to be biologically significant if the change affects growth, survival, and/or reproduction.

Currently NMFS uses a received level of 160 dB re 1 micro Pascal (μPa) root mean square (rms) for impulse noises, which are characterized by rapid rise times (*e.g.*, impact pile driving), as the onset of marine mammal behavioral harassment, and 120 dB re 1 μPa (rms) for non-impulse noise sources (*e.g.*, DP vessel thrusters). No impulse noise is expected from activities under this IHA. For Neptune's maintenance, repair and decommissioning activities, only the 120 dB re 1 μPa (rms) threshold is considered because only non-impulse noise sources would be generated.

Hearing Impairment and Other Physiological Effects

Marine mammals exposed to high intensity sound repeatedly or for prolonged periods can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Kastak *et al.*, 1999; Schlundt *et al.*, 2000; Finneran *et al.*, 2002; 2005). TS can be permanent (PTS), in which case the loss of hearing sensitivity is unrecoverable, or temporary (TTS), in which case the animal's hearing threshold will recover over time (Southall *et al.*, 2007). Since marine mammals depend on acoustic cues for vital biological functions, such as orientation, communication, finding prey, and avoiding predators, marine mammals that suffer from PTS or TTS could have reduced fitness, survival, and reproduction, either permanently or temporarily.

TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises and a sound must be stronger in order to be heard. At least in terrestrial mammals, TTS can last from minutes or hours to (in cases of strong TTS) days. For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the noise ends.

Human non-impulsive noise exposure guidelines are based on exposures of equal energy (the same sound exposure level [SEL]) producing equal amounts of hearing impairment regardless of how the sound energy is distributed in time (NIOSH, 1998). Until recently, previous marine mammal TTS studies have also generally supported this equal energy relationship (Southall *et al.*, 2007). Three newer studies, two by Mooney *et al.* (2009a,b) on a single bottlenose dolphin either exposed to playbacks of U.S. Navy mid-frequency active sonar or octave-band noise (4–8 kHz) and one by Kastak *et al.* (2009) on a single California sea lion exposed to airborne octave-band noise (centered at 2.5 kHz), concluded that for all noise exposure situations, the equal energy relationship may not be the best indicator to predict TTS onset levels.

TTS was measured in a single, captive bottlenose dolphin after exposure to a continuous tone with maximum SPLs at frequencies ranging from 4 to 11 kHz that were gradually increased in intensity to 179 dB re 1 μPa and in duration to 55 minutes (Nachtigall *et al.*, 2003). No threshold shifts were measured at SPLs of 165 or 171 dB re

1 μPa. However, at 179 dB re 1 μPa, TTSs greater than 10 dB were measured during different trials with exposures ranging from 47 to 54 minutes. Hearing sensitivity apparently recovered within 45 minutes after noise exposure.

For baleen whales, there are no data on levels or properties of sound that are required to induce TTS. The frequencies to which baleen whales are most sensitive are lower than those to which odontocetes are most sensitive, and natural background noise levels at those low frequencies tend to be higher. Sounds that are produced in the frequency range at which an animal hears the best do not need to be as loud as sounds in less functional frequencies to be detected by the animal. As a result, auditory thresholds of baleen whales within their frequency band of best hearing are believed to be higher (less sensitive) than are those of odontocetes at their best frequencies (Clark and Ellison, 2004). Therefore, for a sound to be audible, baleen whales require sounds to be louder (*i.e.,* higher dB levels) than odontocetes in the frequency ranges at which each group hears the best. Based on this information, it is suspected that received levels causing TTS onset may also be higher in baleen whales. Since current NMFS practice assumes the same thresholds for the onset of hearing impairment in both odontocetes and mysticetes, NMFS' onset of TTS threshold is likely conservative for mysticetes.

In free-ranging pinnipeds, TTS thresholds associated with exposure to underwater sound have not been measured; however, systematic TTS studies on captive pinnipeds have been conducted (Kastak *et al.,* 1999, 2005; Schusterman *et al.,* 2000; Southall *et al.,* 2007). Kastak *et al.* (1999) reported TTS of approximately 4–5 dB in three species of pinnipeds (harbor seal, Californian sea lion, and northern elephant seal) after underwater exposure for approximately 20 minutes to noise with frequencies ranging from 100–2,000 Hz at received levels 60–75 dB above hearing threshold. This approach allowed similar effective exposure conditions to each of the subjects but resulted in variable absolute exposure values depending on subject and test frequency. Recovery to near baseline levels was reported within 24 hours of noise exposure (Kastak *et al.,* 1999). Kastak *et al.* (2005) followed up on their previous work using higher sensitivity levels and longer exposure times (up to 50 minutes) and corroborated their previous findings. The sound exposures necessary to cause slight threshold shifts were also determined for two California sea lions and a juvenile elephant seal exposed to underwater sound for similar duration. The sound level necessary to cause TTS in pinnipeds depends on exposure duration, as in other mammals; with longer exposure, the level necessary to elicit TTS is reduced (Schusterman *et al.,* 2000; Kastak *et al.,* 2005). For very short exposures (*e.g.,* to a single sound pulse), the level necessary to cause TTS is very high (Finneran *et al.,* 2002).

Vessel Strikes

Vessel strikes pose a substantial risk to large whales, with North Atlantic right whales being particularly susceptible due to its congregations and movements in and around shipping lanes, near-shore behaviors, and time spent at the surface (Nowacek *et al.,* 2004). Ship strikes of cetaceans can cause major wounds, which may lead to the death of the animal. An animal at the surface could be struck directly by a vessel, a surfacing animal could hit the bottom of a vessel, or an animal just below the surface could be cut by a vessel's propeller. The severity of injuries typically depends on the size and speed of the vessel (Knowlton and Kraus, 2001; Laist *et al.,* 2001; Vanderlaan and Taggart, 2007). The most vulnerable marine mammals are those that spend extended periods of time at the surface in order to restore oxygen levels within their tissues after deep dives (*e.g.,* the sperm whale). In addition, some baleen whales, such as the North Atlantic right whale, seem generally unresponsive to vessel sound, making them more susceptible to vessel collisions (Nowacek *et al.,* 2004). These species are primarily large, slow moving whales. Smaller marine mammals (*e.g.,* bottlenose dolphin) move quickly through the water column and are often seen riding the bow wave of large ships. Marine mammal responses to vessels may include avoidance and changes in dive pattern (NRC, 2003).

In an effort to reduce right whale strikes, NMFS issued a Final Rule to reduce the severity and likelihood of vessel strikes to North Atlantic right whales, which went into effect on December 9, 2008 (73 FR 60173 [October 10, 2008]). The U.S. Northeast Great South Channel Mandatory Speed Restriction Seasonal Management Area is active April 1 through July 31, annually. All Neptune vessels would abide by the speed, monitoring, and reporting restrictions contained within the Rule, including reducing vessel speed to 10 knots while in a seasonal management area and traffic scheme restrictions.

Potential Effects on Marine Mammal Habitat

The proposed action area is inhabited by North Atlantic right, fin, humpback, and minke whales during part of the seasons, and is adjacent to the Stellwagen Bank NMS. In January 2016, NMFS issued a final rule modifying North Atlantic right whale critical habitat. As a result of that modification, the Port is now located within right whale critical habitat.

Loss or modification of marine mammal habitat could arise from maintenance, repair, and decommissioning activities by altering benthic habitat, degrading water quality, and introduction of noise. Short-term impacts on benthic communities will occur during the decommissioning and removal or abandonment of Neptune DWP components at the north and south buoys and hot tap. Proposed activities will temporarily disturb small localized areas around each installed component slated for removal. Activities will produce suspension of fine sediments and resettlement of suspended sediments is the area immediately adjacent to ongoing operations. Resettlement of suspended sediments will produce localized reductions in benthic growth, reproduction, and survival rates of indigenous fauna; if the sediment resettlement is significant, smothering of benthic flora and fauna may occur.

Maintenance, repair, and decommissioning is also likely to cause disturbance of the seafloor and increase turbidity. Sediment transport modeling conducted by Neptune on construction procedures indicated that initial turbidity from installation of the pipeline could reach 100 milligrams per liter (mg/L), but will subside to 20 mg/L after 4 hours. Turbidity associated with the flowline and hot-tap will be considerably less and also will settle within hours of the work being completed. Marine mammals could be indirectly affected if benthic prey species were displaced or destroyed by repair activities; however, these impacts would be brief and rebound when decommissioning is complete. Therefore, NMFS has preliminarily determined any impacts from Neptune's maintenance, repair, and decommissioning activities to marine mammal habitat are not expected to cause significant or long-term consequences for individual marine mammals or populations.

Proposed Mitigation

In order to issue an incidental take authorization (ITA) under sections

101(a)(5)(A) and (D) of the MMPA, NMFS must, where applicable, set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant).

Neptune submitted a "Monitoring and Mitigation Plan for Neptune Deepwater LNG Port Maintenance, Repair, and Decommissioning (MMDMP)" as part of its MMPA application (Appendix A of the application; see **ADDRESSES**). The MMDMP will provide the framework for mitigation and monitoring during the proposed activities. These measures include the following components: (1) Visual and acoustic monitoring program; (2) safety/shutdown zones; (3) recording and reporting; and (4) vessel speed/area restrictions.

The mitigation protocols have been designed to provide both protection to marine mammals from exposure to the highest noise levels and contributions to noise characterization and species for the region. The mitigation measures will reduce the impact to marine mammals by minimizing exposure to potentially disruptive noise levels. The mitigation measures will further reduce any potential ship strikes to large whales in the area. The measures, which include use of protected species observers on all DP vessels, mitigation zones, and vessel speed reductions, are described below. If Neptune has to take action (*e.g.,* cease vessel movement, power down thrusters), the activity may resume after the marine mammal is positively reconfirmed outside the established zones or if the marine mammal has not been re-sighted in the established zones for 30 minutes.

Mitigation Measures

1. Any whale visually sighted or otherwise detected (*e.g.,* on the Navigational Telex (NAVTEX), NOAA Weather Radio, NOAA Right Whale Sighting Advisory System (SAS)) within 1,000 m of a vessel shall result in a heightened alert status which will require all project vessels to operate at slow speeds of 4-knots or less and any non-critical departure plans to be delayed.

2. If a right whale call is confirmed on the two closest passive acoustic monitoring (PAM) buoys or on any three PAM buoys, all vessels will go into heightened alert status requiring all project vessels to operate at slow speeds of 4 knots or less and any non-critical departure plans to be delayed.

3. Any whale sighted within or approaching 500 m of a vessel shall result in that vessel using idle speed and/or ceasing all movement. If the vessel is operating DP thrusters, the thrusters will be shut down or reduced to minimal safe operating power. The speed and activity restrictions shall continue until either the observed whale has been confirmed outside of and on a path away from 500m from the vessel or 30 minutes have passed without another confirmed detection.

4. Any non-whale marine mammal species detected within or approaching 100 m of a vessel shall result in that vessel using idle speed and/or ceasing all movement. If the vessel is operating DP thrusters, the thrusters will be shut down or reduced to minimal safe operating power. The speed and activity restrictions shall continue until either the observed marine mammal has been confirmed outside and on a path away from 100 m from the activity or 30 minutes have passed without another confirmed detection.

5. All project vessels will remain at least 500 m away from any North Atlantic right whale and at least 100 m away from all other marine mammals. If a marine mammal approaches a stationary vessel, that vessel will sit idle or turn off engines until the marine mammal has left the designated zone or 30 minutes have passed without another confirmed detection.

6. All vessels shall utilize the International Maritime Organization (IMO)-approved Boston Traffic Separation Scheme (TSS) on their approach to and departure from the Neptune DWP and/or the unscheduled maintenance/maintenance area at the earliest practicable point of transit in order to avoid the risk of whale strikes.

7. Repair vessels, DSVs, and HLVs, will transit at 10 knots (18.5 km/hr) or less in the following seasons and areas, which either correspond to or are more restrictive than the times and areas in NMFS' final rule (73 FR 60173 [October 10, 2008]) to implement speed restrictions to reduce the likelihood and severity of ship strikes of right whales:

- CCB Seasonal Management Area (SMA) from January 1 through May 15, which includes all waters in CCB, extending to all shorelines of the Bay, with a northern boundary of 42°12′ N. latitude;
- Off Race Point SMA year round, which is bounded by straight lines connecting the following coordinates in the order stated: 42°30′ N. 69°45′ W.; thence to 42°30′ N. 70°30′ W.; thence to 42°12′ N. 70°30′ W.; thence to 42°12′ N. 70°12′ W.; thence to 42°04′56.5″ N. 70°12′ W.; thence along mean high water line and inshore limits of COLREGS[1] limit to a latitude of 41°40′ N.; thence due east to 41°41′ N. 69°45′ W.; thence back to starting point; and
- Great South Channel (GSC) SMA from April 1 through July 31, which is bounded by straight lines connecting the following coordinates in the order stated:

42°30′ N.	69°45′ W.
41°40′ N.	69°45′ W.
41°00′ N.	69°05′ W.
42°09′ N.	67°08′24″ W.
42°30′ N.	67°27′ W.
42°30′ N.	69°45′ W.

8. All vessels transiting to and from the project area shall report their activities to the mandatory reporting Section of the USCG to remain apprised of North Atlantic right whale movements within the area. All vessels entering and exiting the Mandatory Ship Reporting Area (MSRA) shall report their activities to WHALESNORTH. Vessel operators shall contact the USCG by standard procedures promulgated through the Notice to Mariner system. Information regarding the geographical boundaries and reporting details can be found at: *http://www.fisheries.noaa.gov/pr/shipstrike/msr.htm.*

9. Prior to leaving the dock to begin transit, the project vessel must contact one of the PSOs on watch to receive an update of sightings within the visual observation area. If the PSO has observed a North Atlantic right whale within 30 minutes of the transit start, the vessel will hold for 30 minutes and again get a clearance to leave from the PSOs on board. PSOs will assess whale activity and visual observation ability at the time of the transit request to clear the barge for release.

10. No vessels will transit from shore to the project site during nighttime or when visibility is reduced below 1,000 m, unless an emergency situation requires the vessel to transit during those times. Should transit at night be required, the maximum speed will be 5 knots (9.3 km/hr).

11. All vessels will consult NAVTEX, NOAA Weather Radio, the NOAA Right Whale SAS or other means to obtain current large whale sighting information.

12. If member of the crew visually detects a marine mammal within the ZOI (3.45 km), they will alert the lead

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[1] The International Regulations for Preventing Collisions at Sea 1972 (COLREGS) are published by the International Maritime Organization (IMO) and set out, among other things, the "rules of the road" or navigation rules to be followed by ships and other vessels at sea to prevent collisions between two or more vessels.

PSO on watch who shall then relay the sighting information to the other vessels to document take, determine if mitigation actions are necessary, as required by this IHA, and ensure action(s) can be taken to avoid physical contact with marine mammals.

13. In response to any whale sightings or acoustic detections, and taking into account exceptional circumstances, all vessels shall actively communicate with the PSO(s) on watch and will take appropriate actions to minimize the risk of striking whales.

14. Neptune must immediately suspend any repair, maintenance, or decommissioning activities if a dead or injured marine mammal is found in the vicinity of the project area, and the death or injury of the animal could be attributable to the LNG facility activities. Neptune must contact NMFS and the Greater Atlantic Regional Office (GARFO) Marine Mammal Stranding and Disentanglement Program. Activities will not resume until review and approval has been given by NMFS.

15. Use of lights during repair or maintenance activities shall be limited to areas where work is actually occurring, and all other lights must be extinguished. Lights must be downshielded to illuminate the deck and shall not intentionally illuminate surrounding waters, so as not to attract whales or their prey to the area.

16. Transit route, destination, sea conditions and any marine mammal sightings/mitigation actions during watch shall be recorded in the log book.

17. The material barges and tugs used in repair and maintenance shall transit from the operations dock to the work sites during daylight hours when possible provided the safety of the vessels is not compromised. Should transit at night be required, the maximum speed of the tug shall be five knots.

18. All repair vessels must maintain a speed of 10 knots or less during daylight hours. All vessels shall operate at five knots or less at all times within five km of the maintenance, repair, or decommissioning area.

19. All decommissioning work will occur during the May 1 to November 30 seasonal window so that disturbance to North Atlantic right whales will be largely avoided.

Mitigation Conclusions

NMFS has carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation.

Any mitigation measure(s) prescribed by NMFS should be able to accomplish, have a reasonable likelihood of accomplishing (based on current science), or contribute to the accomplishment of one or more of the general goals listed below:

1. Avoidance or minimization of injury or death of marine mammals wherever possible (goals 2, 3, and 4 may contribute to this goal);

2. A reduction in the numbers of marine mammals (total number or number at biologically important time or location) exposed to received levels of DP vessel thrusters, or other activities expected to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only);

3. A reduction in the number of times (total number or number at biologically important time or location) individuals would be exposed to received levels of DP vessel thrusters, or other activities expected to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only);

4. A reduction in the intensity of exposures (either total number or number at biologically important time or location) to received levels of DP vessel thrusters, or other activities expected to result in the take of marine mammals (this goal may contribute to a, above, or to reducing the severity of harassment takes only);

5. Avoidance or minimization of adverse effects to marine mammal habitat, paying special attention to the food base, activities that block or limit passage to or from biologically important areas, permanent destruction of habitat, or temporary destruction/disturbance of habitat during a biologically important time; and

6. For monitoring directly related to mitigation—an increase in the probability of detecting marine mammals, thus allowing for more effective implementation of the mitigation.

Proposed Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth, "requirements pertaining to the monitoring and reporting of such taking." The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area. Neptune submitted a marine mammal monitoring plan as part of the IHA application (see Appendix A of the application). The plan may be modified or supplemented based on comments or new information received from the public during the public comment period.

Summary of Marine Mammal Monitoring Reports

NMFS reviewed Neptune's marine mammal monitoring report submitted as a requirement of their LOA covering July 2011 to July 2016. During the five-year period, the Port was operational between April 2010, and July 12, 2011; however, no SRVs visited the Port. As such, no marine mammal monitoring occurred. Between July 6–17, 2011, Neptune performed repair activities at the north buoy. During the repair work, four PSOs kept 24-hour watch for marine mammals and sea turtles. There were 24 marine mammal sightings comprising four species: Minke whales (n = 9), fin whales (n = 2), humpback whales (n = 5), short-beaked common dolphins (n = 2), and harbor porpoise (n = 1). In addition, three sightings of an unidentified cetacean and one sighting of an unidentified seal occurred. In total, 171 individuals were sighted with the majority (n = 135) being common dolphins. Two fin whales traveling together and approximately 130 common dolphins entered the 100 yard mitigation zone while thrusters were in use. On both occasions, divers were in the water and changes to thruster activity or power would endanger those divers or property. NMFS notes that the 100 yard mitigation zone did not constitute a Level A take area (due to source power at 1 meter being equal or less than the 180 dB re 1 μPa (rms) Level A threshold criterion that was in place during the authorization period) but was enacted to decrease elevated noise exposure. Therefore, Neptune did not take a marine mammal in a manner not authorized by their LOA. After July 17, 2011, there were no port activities; therefore, no marine mammal monitoring was conducted.

Monitoring measures prescribed by NMFS should accomplish one or more of the following general goals:

1. An increase in the probability of detecting marine mammals, both within the mitigation zone (thus allowing for more effective implementation of the mitigation) and in general to generate more data to contribute to the analyses mentioned below;
2. An increase in our understanding of how many marine mammals are likely to be exposed to levels of thruster noise we associate with specific adverse effects, such as behavioral harassment, TTS, or PTS;
3. An increase in our understanding of how marine mammals respond to stimuli expected to result in take and how anticipated adverse effects on individuals (in different ways and to varying degrees) may impact the population, species, or stock (specifically through effects on annual rates of recruitment or survival) through any of the following methods:
   - Behavioral observations in the presence of stimuli compared to observations in the absence of stimuli (need to be able to accurately predict received level, distance from source, and other pertinent information);
   - Physiological measurements in the presence of stimuli compared to observations in the absence of stimuli (need to be able to accurately predict received level, distance from source, and other pertinent information);
   - Distribution and/or abundance comparisons in times or areas with concentrated stimuli versus times or areas without stimuli;
4. An increased knowledge of the affected species; and
5. An increase in our understanding of the effectiveness of certain mitigation and monitoring measures.

The following describes Neptune's proposed monitoring plan components. The monitoring efforts would support the proposed mitigation actions described above.

Visual Monitoring

1. All vessel crew members will undergo environmental training. Crew members who will act as designated watch personnel during heightened awareness conditions (whale within 1,000 m) will receive specialized observer training.

2. All vessel operation requirements, guidelines and mitigation requirements will be clearly posted on the bridge of all project vessels.

3. Neptune or its contractor shall provide a half-day training course to designated crew members assigned to the transit barges and other support vessels. This course shall cover topics including, but not limited to, descriptions of the marine mammals found in the area, mitigation and monitoring requirements contained in this Authorization, sighting log requirements, and procedures for reporting injured or dead marine mammals. These designated crew members shall be required to keep watch on the bridge and immediately notify the navigator of any whale sightings. All watch crew shall sign into a bridge log book upon start and end of watch. Transit route, destination, sea conditions, and any protected species sightings/mitigation actions during watch shall be recorded in the log book.

4. Each DP vessel will employ three professional PSOs. Two PSOs will conduct continual visual watches on a shift basis during all daylight hours. The third PSO will stand night watch. Daytime PSOs will monitor the acoustic alert program when not on active visual watch. During the night, one PSO will monitor the acoustic alert program and will scan the area around the vessel using a thermal imaging or similar enhancement device for 15 minutes each hour.

5. All professional PSOs will be approved by NMFS prior to the start of the project, will have at least one full year of marine mammal observation experience in the U.S. Atlantic, Pacific or Gulf of Mexico, and will have experience in acoustic monitoring and baleen whale detection.

6. Each non-DP vessel will designate one trained crew member to stand a dedicated watch during all vessel movement and during times of heightened awareness. All designated crew watch personnel will undergo a full day of project-specific mitigation and monitoring training alongside the professional PSOs.

7. PSOs will be responsible for advising vessel crew members on the required operating procedures and mitigation measures that are defined in the IHA. PSOs will be responsible for providing the required observation and detection data during the decommissioning activities.

Acoustic Monitoring

As a requirement of previous incidental take authorizations issued to Neptune, a passive acoustic monitoring array was installed around the project area and Boston Traffic Separation Scheme (TSS) to supplement visual monitoring and provide additional information regarding use of the area by marine mammals. This network consists of 19 autonomous recording units (ARUs) and near-real-time acoustic buoys. Neptune shall maintain a passive acoustic monitoring array consisting of four near real-time ARUs strategically placed around the north and south buoys for the life of the IHA to monitor for whale calls and record and analyze background and project-related noise levels. The location of the buoys is strategic to cover part of the Boston TSS, and the Neptune project area. Because no vessels will be coming from offshore, the remaining offshore buoys have been removed.

The PAM buoys continuously record and analyze underwater sounds, including calling whales, throughout the entirety of the deployment period. The buoys can be operated in real time when bandwidth allows periodic transfer of data, or buoys can operate using auto-detection capabilities. When the onboard software detects a whale call, the buoy sends the spectral data for the detected signal via radio link to a computer display or handheld device that is monitored by the PSO on duty. If a detection alert is received, the PSO will review the data and confirm that the signal is a whale call. Upon verification, the PSO will monitor the other buoys for call detections. If the PSO verifies detections from the next closest buoy or two other buoys, then vessels will go into "heightened awareness" mode. Mitigation measures for acoustic detection of whales will be the same as those for visual detection described in the "Proposed Mitigation" section above. Additionally, upon acoustic confirmation of a North Atlantic right whale within 1000 m of the project site, all vessel captains will be immediately notified, crew PSOs will stand watch, vessel speeds will be reduced, transits will be delayed unless crew safety is compromised, and the area will be visually and acoustically monitored until the PSO determines that normal operating procedures can be resumed. Acoustic monitoring will be conducted at night to substitute visual monitoring not allowed for by thermal imaging or similar enhancement device.

Reporting Measures

Since the Port is within the MSRA, all vessels transiting to and from Neptune shall report their activities to the mandatory reporting section of the USCG to remain apprised of North Atlantic right whale movements within the area. All vessels entering and exiting the MSRA shall report their activities to USCG's northeast whale reporting system (WHALESNORTH). Vessel operators shall contact the USCG by standard procedures promulgated through the Notice to Mariner system.

During all phases of project construction, sightings of any injured or dead marine mammals will be reported immediately to the USCG and NMFS, regardless of whether the injury or death is caused by project activities. Sightings of injured or dead marine mammals not associated with project activities can be reported to the USCG on VHF Channel 16 or to NMFS GARFO Marine Mammal Stranding and Disentanglement Program. In addition, if the injury or death was caused by a project vessel (*e.g.,* DSV, HLV, tug, support vessel, etc.), the USCG must be notified immediately, and a full incident report must be provided to NMFS, Greater Atlantic Regional Fisheries Office (GARFO). The report must include the following information: (1) The time, date, and location (latitude/longitude) of the incident; (2) the name and type of vessel involved; (3) the vessel's speed during the incident; (4) a description of the incident; (5) water depth; (6) environmental conditions (*e.g.,* wind speed and direction, sea state, cloud cover, and visibility); (7) the species identification or description of the animal; (8) the fate of the animal; and (9) photographs or video footage of the animal (if equipment is available).

Neptune must submit an annual report on marine mammal monitoring and mitigation actions taken or not taken to the NMFS Office of Protected Resources and GARFO within 90 days after the expiration of the IHA. The annual report should include data collected for each distinct marine mammal species observed in the project area in the Massachusetts Bay during the period of LNG facility construction and operations. Description of marine mammal behavior, numbers of individuals observed, frequency of observation, and any behavioral changes and the context of the changes relative to construction and operation activities shall also be included in the annual report. Additional information that will be recorded during construction and contained in the reports include: date and time of marine mammal detections (visually or acoustically), weather conditions, species identification, approximate distance from the source, activity of the vessel or at the construction site when a marine mammal is sighted, and whether thrusters were in use and, if so, how many at the time of the sighting and energy level.

In the event that Neptune discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized (if the IHA is issued) (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), Neptune shall report the incident to the Chief, Permits and Conservation Division, Office of Protected Resources, NMFS, and the NMFS Northeast Marine Mammal Stranding Coordinators within 24 hours of the discovery. Neptune shall provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the GARFO Marine Mammal Stranding and Disentanglement Program. Neptune can continue its operations under such a case.

General Conclusions Drawn From Previous Monitoring Reports

Neptune has submitted numerous reports, including weekly reports during port construction, to NMFS as required by previous IHAs and the 2011–2016 LOA. While it is difficult to draw biological conclusions from these reports, NMFS can make some general conclusions. Data gathered by PSOs is generally useful to indicate the presence or absence of marine mammals (often to a species level) within the safety zones (and sometimes without) and to document the implementation of mitigation measures. Though it is by no means conclusory, it is worth noting that no instances of obvious behavioral disturbance as a result of Neptune's activities were documented by PSOs.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment). Only take by Level B harassment is anticipated as a result of Neptune's use of DP vessel thrusters during maintenance, repair, and decommissioning activities. Additionally, vessel strikes are not anticipated because of the monitoring and mitigation measures described earlier in this document.

Decommissioning and Maintenance Sound

Acoustic modeling and *in situ* measurements using a version of the Range Dependent Acoustic Model (RAM) were conducted for issuance of Neptune's previous IHAs and LOA. The noise fields utilized to assess construction (pipelaying) scenarios used a surrogate, multi-vessel activity scenario which included the Castoro II lay barge, two tugs, one DP survey vessel working on the flowline between the North and South buoys, and SRVs to access the DWP (Laurinolli *et al.,* 2005). DP vessels similar to the DSV or HLV used for maintenance and decommissiong were not included in this model. Because the SRVs used for construction and operation are larger and employ greater horsepower than the vessels to be used during maintenance, repair and decommissioning, thruster noise from DP vessels used under this IHA is less than that generated from SRVs. Modeling results showed broadband source level for an SRV is 180 dB re 1 μPa (rms) while modeled broadband source level for a proxy DSV and HLV is 177.9 dB re 1 μPa (rms). Neptune used this 177.9 dB re 1 μPa (rms) source level to determine distances to the 120 dB re 1 μPa (rms) isopleth and calculate associated ZOI.

Neptune calculated the ensonified area in which a marine mammal anywhere in the water column could potentially be exposed to a 120 dB re 1 μPa (rms) sound pressure level. Thruster use would occur at three locations: The north buoy, south buoy and hot tap. The north and south buoys are located in areas with similar characteristics (*e.g.,* water depth, substrate type) which should result in similar transmission loss rates while the hot tap is located in shallower waters. Therefore, Neptune modeled transmission loss at the south buoy and hot tap which resulted in a 3.45 km and 3.12 km distance to the 120 dB re 1 μPa (rms) isopleth, respectively. Calculating for area, this equals a ZOI of 37.4 km^2 and 31 km^2 at the south buoy and hot tap, respectively. Because the number of days working at the hot tap is unknown, Neptune conservatively calculated the amount of take of marine mammals based on transmission loss rates at the south buoy (ZOI = 37.4 km^2) for the full 70 days of decommissioning work and allowed for two weeks of unscheduled maintenance and repair.

For continuous sounds, such as those produced by Neptune's specified activity (*i.e.,* thrusters), NMFS uses a received level of 120 dB re 1 μPa (rms) to indicate the onset of potential for Level B harassment. Neptune's take estimates were derived by applying the modeled zone of influence (ZOI; *e.g.*, the area ensonified by the 120 dB re 1 μPa (rms) contour) at the south buoy to the highest seasonal use (density) of the area by marine mammals and estimated duration of maintenance, repair, and decommissioning activities. The take estimates provided in Neptune's application are likely an overestimate of actual take for the following reasons: Neptune is applying the larger ZOI for all activities despite that some maintenance, repair, and decommissioning activities will occur at the hot tap/transfer manifold which is located in shallower water and is modeled to have a smaller zone of influence than the south buoy (3.12 km vs 3.45 km), summer marine mammal densities are used to calculate take; however, some activities may occur outside of the summer months when densities are lower, maintenance activities are not currently planned but two weeks of work is included here as a precaution for unexpected equipment malfunction prior to decommissioning, and the take estimates do not take into consideration the mitigation and monitoring measures that are proposed for inclusion in the IHA, if issued. Because some components of the project are unknown (*e.g.*, days at hot tap vs days at south buoy; number of work days outside of peak summer abundance), NMFS is preliminarily accepting of these conservative estimates and is proposing to issue the requested amount of take.

Acoustic propagation modeling for the proposed activity was completed using a version of the RAM. This model considers range and depth along with seasonal sound velocity and geoacoustic properties of the seafloor. Frequency dependence of the sound propagation characteristics was treated by computing acoustic transmission loss at the center frequencies of all ⅓ octave bands between 10 Hz and 2 kHz. Received sound pressure levels in each band were computed by applying frequency-dependent transmission losses to the corresponding ⅓ octave band source levels. The highest ⅓ octave band level at each interval was used as the received level at that range. In order to extrapolate ZOI spatial extent, the range to each threshold was also analyzed to determine the 95th percentile radius for each noise threshold level. More information on the modeling methodology can be found in Neptune's application (see **ADDRESSES**). Neptune concluded distance to the 120 dB re 1 μPa (rms) isopleth at the south buoy extends 1.9 nautical miles (3.45 km) resulting in a ZOI of 37.4 km^2.

The density calculation methodology applied to take estimates for this application is derived from the model results produced by Roberts *et al.* (2016) for the east coast region. These files are available as raster files from the NOAA Web site: *http://seamap.env.duke.edu/models/Duke-EC-GOM-2015/*. In order to determine cetacean densities for take estimates, the grid cells that included the ZOI for the hot tap, north, and south buoys were selected for months 5 through 10 (May–October). The estimated mean monthly abundance for each species for each month was an average of May to October grid cells. Monthly values were not available for some species (*e.g.*, killer whale, blue whale); therefore, only the single value available is presented here. Estimates provided by the models are based on a grid cell size of 100 km^2; therefore, model grid cell values were divided by 100 to determine animals km^{-2}. Gray seal and harbor seal densities are not provided in the Roberts *et al.* (2016) models. Seal densities were derived from the Strategic Environmental Research and Development Program (SERDP) using the Navy Oparea Density Estimate (NODE) model for the Northeast Opareas (Best *et al.*, 2102). Densities for those species potentially taken by the specified activity are provided in Table 2 below.

Take estimates were derived using the following calculation: T = D × ZOI × 84 days where T is equal to take and D is equal to density. As a review, the ZOI is 37.4 km^2 based on distance to the 120 dB re 1 μPa (rms) at the south buoy while 84 days constitutes 70 days of decommissioning work and 14 days of unscheduled maintenance. Proposed take numbers, by species, is provided in Table 2.

TABLE 2—ESTIMATED TAKE OF MARINE MAMMALS, BY SPECIES, INCIDENTAL TO THE SPECIFIED ACTIVITY

Species	Estimated population (Waring *et al.*, 2015)	Density	Estimated takes	Population (%)
North Atlantic right whale (*Eubalaena glacialis*)	476	0.000017	2	0.21.
Fin whale (*Balaenoptera physalus*)	1,618	0.0034	12	0.12.
Humpback whale (*Megaptera novaeangliae*)	823	0.0032	10	0.22.
Minke whale (*Balaenoptera acutorostrata*)	20,741	0.0033	11	0.009.
Sei whale (*Balaenoptera borealis*)	357	0.000036	2	0.28.
Atlantic white-sided dolphin (*Lagenorhynchus acutus*)	48,819	0.039	124	0.043.
Long-finned pilot whale (*Globicephala melas*)	26,535	0.0019	8	0.035.
Harbor porpoise (*Phocoena phocoena*)	79,883	0.104	328	0.068.
Bottlenose dolphin (*Tursiops truncatus*)	77,532	0.003	10	0.002.
Short beaked common dolphin (*Delphinus delphis*)	173,486	0.0071	*270	0.002.
Risso's dolphin (*Grampus griseus*)	18,250	0.000044	2	0.005.
Killer whale (*Orcinus orca*)	unk	0.0000089	2	Insufficient data.
Harbor seal (*Phoca vitulina*)	75,834	0.097	305	0.067.
Gray sea (*Halichoerus grypus*)	unk	0.027	1586	0.002.

*Although the take methodology results in an estimated take of 23 common dolphins, this species travels in large aggregations. Therefore, NMFS is proposing to authorize take based on two encounters of a group size documented within the ZOI in Neptune's monitoring reports (*i.e.*, 135 × 2).

Analysis and Preliminary Determination

Negligible Impact

NMFS has defined "negligible impact" in 50 CFR 216.103 as "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival." In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) The number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, intensity, and duration of Level B harassment; and (4) the context in which the takes occur.

No injuries or mortalities are anticipated to occur as a result of Neptune's proposed port maintenance, repair, and decommissioning activities, and none are proposed to be authorized by NMFS. Animals in the area are not anticipated to incur any permanent hearing impairment (*i.e.,* PTS) due to low source levels. The IHA would be conditioned to minimize the risk of vessel strike (see "Mitigation Measures") including, but not limited to, reduced vessel speed and delaying transit if whales are detected within or visibility is less than 1,000 m.

Many animals perform vital functions, such as feeding, resting, traveling, and socializing, on a diel cycle (24-hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Consequently, a behavioral response lasting less than one day and not recurring on subsequent days is not considered particularly severe unless it could directly affect reproduction or survival (Southall *et al.,* 2007). DP-thrusters may operate on consecutive days; however, NMFS does not anticipate a marine mammal to remain stationary such that it would be exposed to DP-thruster noise over multiple days. The intensity and nature of any incidental takes occurring from DP vessel thruster use is believed to be mild to moderate. The most likely effect from the action is localized, short-term behavioral disturbance from animals may avoid the area (and therefore avoid exposure) and some masking will likely occur; however, the implementation of the mitigation measures are intended to decrease these effects.

As stated previously, NMFS' practice has been to apply the 120 dB re 1 μPa (rms) received level threshold for underwater continuous sound levels to determine whether take by Level B harassment occurs; however, not all animals react to sounds at this low level, and many will not show strong reactions (and in some cases any reaction) until sounds are much stronger. Southall *et al.* (2007) provide a severity scale for ranking observed behavioral responses of both freeranging marine mammals and laboratory subjects to various types of anthropogenic sound (see Table 4 in Southall *et al.* (2007)). Tables 15, 17, 19, and 21 in Southall *et al.* (2007) outline the numbers of low-frequency, mid-frequency, and high-frequency cetaceans and pinnipeds in water, respectively, reported as having behavioral responses to non-pulses in 10-dB received level increments. These tables illustrate, especially for cetaceans, more intense observed behavioral responses did not occur until sounds were higher than 120 dB re 1 μPa (rms). Many of the animals had no observable response at all when exposed to anthropogenic sound at levels of 120 dB re 1 μPa (rms) or higher.

Potential impacts to marine mammal habitat were discussed previously in this document (see the "Anticipated Effects on Habitat" section). Although some disturbance is possible to food sources of marine mammals, the impacts are anticipated to be minor enough as to not affect annual rates of recruitment or survival of marine mammals in the area. Based on available habitat not impacted by the activity where feeding by marine mammals occurs versus the localized area of the maintenance, repair, and decommissioning activities, any missed feeding opportunities in the direct project area would be minor based on the fact that other feeding areas exist elsewhere.

Taking into account the mitigation measures that are planned, effects on marine mammals are generally expected to be restricted to avoidance of a limited area around the Port and short-term changes in behavior, falling within the MMPA definition of "Level B harassment." Mitigation measures would include minimizing harassment by powering down thrusters under certain conditions and three PSOs would be on-board each DP vessel to implement these measures. Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the required monitoring and mitigation measures, NMFS preliminarily finds that the total take of marine mammals from thruster use during Port maintenance, repair, and decommissioning will have a negligible impact on the affected marine mammal species or stocks.

Small Numbers Analysis

As shown in Table 2, the percent of any marine mammal stock potentially taken by the specific activity is less than one percent, and Massachusetts Bay represents only a small fraction of the western North Atlantic basin where these animals occur. In addition, the take estimates include two weeks of maintenance and repair work that is currently not scheduled and may not occur prior to decommissioning. Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and taking into consideration the implementation of the mitigation and monitoring measures, we preliminarily find that small numbers of marine mammals will be taken relative to the populations of the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, we have determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

On January 12, 2007, NMFS concluded consultation with MARAD and USCG under section 7 of the ESA on the proposed construction and operation of the Port and issued a Biological Opinion. The finding of that consultation was that the construction and operation of the Port may adversely affect, but is not likely to jeopardize, the continued existence of northern right, humpback, and fin whales, and is not likely to adversely affect sperm, sei, or blue whales and Kemp's ridley, loggerhead, green, or leatherback sea turtles.

On March 2, 2010, MARAD and USCG sent a letter to NMFS requesting reinitiation of the section 7 consultation. MARAD and USCG determined that certain routine planned operations and maintenance activities, inspections, surveys, and unplanned repair work on the Port pipelines and flowlines, as well as any other Port component (including buoys, risers/umbilicals, mooring systems, and sub-sea manifolds), may constitute a modification not previously considered in the 2007 Biological Opinion. Decommissioning is addressed as one of the activities in the NOAA Biological Opinion for MARAD's issuance of a license for Neptune to own and operate the Port (dated July 12, 2010).

On January 27, 2016, NMFS published a rule in the **Federal Register** expanding critical habitat for the North Atlantic right whale (81 FR 4838). This expansion incorporates the Port which was previously not within designated critical habitat. As such, NMFS is pursuing informal consultation with the Greater Atlantic Regional Office and will conclude all ESA consultation requirements prior to issuing the proposed IHA.

National Environmental Policy Act (NEPA)

MARAD and the USCG released a Final EIS/Environmental Impact Report (EIR) for the construction, operation, and decommissioning of the Port (see **ADDRESSES**). A notice of availability was published by MARAD on November 2, 2006 (71 FR 64606). The Final EIS/EIR provides detailed information on the proposed project facilities, construction methods, and analysis of potential impacts on marine mammals.

NMFS was a cooperating agency in the preparation of the Draft and Final EIS based on a Memorandum of Understanding related to the Licensing of Deepwater Ports entered into by the U.S. Department of Commerce along with 10 other government agencies. On June 3, 2008, NMFS adopted the USCG and MARAD Final EIS and issued a separate Record of Decision for issuance of previous MMPA incidental take authorizations pursuant to sections 101(a)(5)(A) and (D) of the MMPA for construction and operation of the Port, which includes thruster use. The analysis in the Final EIS regarding the impact of noise generated by thrusters supports the findings under the MMPA for issuance of this proposed authorization. NMFS has preliminarily determined no additional analysis under NEPA is needed.

As a result of these preliminary determinations, we propose to issue an IHA to Neptune for taking marine mammals incidental to repair, maintenance, and decommissioning of the Port, Massachusetts Bay, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. The proposed IHA language is provided next. Neptune LNG LLC (Neptune), is hereby authorized under section 101(a)(5)(D) of the Marine Mammal Protection Act (MMPA; 16 U.S.C. 1371(a)(5)(D)), to harass marine mammals incidental to maintenance, repair, and decommissioning of a liquefied natural gas (LNG) deepwater port in Massachusetts Bay when adhering to the following terms and conditions:

1. This Incidental Harassment Authorization (IHA) is valid for a period of one year from the date of issuance.

2. This IHA is valid only for dynamic positioning vessel thruster use associated with the maintenance, repair, and decommissioning of an LNG deepwater port in Massachusetts Bay.

3. General Conditions

(a) A copy of this IHA must be in the possession of the Neptune, its designees, and work crew personnel operating under the authority of this IHA.

(b) The species authorized for taking are provided in Table 1 (attached).

(c) The taking by injury (Level A harassment), serious injury, or death of any of the species listed in condition 3(b) of the Authorization or any taking of any other species of marine mammal is prohibited and may result in the modification, suspension, or revocation of this IHA.

(d) Neptune shall conduct briefings between construction supervisors and crews, marine mammal monitoring team, acoustical monitoring team, and Neptune staff or contractors prior to the start of maintenance, repair and decommissioning, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures.

(e) The entity may not conduct decommissioning work prior to May 1, 2017.

4. Mitigation Measures

The holder of this Authorization is required to implement the following mitigation measures:

(a) Any whale visually sighted or otherwise detected (*e.g.,* on the Navigational Telex (NAVTEX), NOAA Weather Radio, and North Atlantic right whale Sighting Advisory System (SAS)) within 1,000 m of a vessel shall result in a heightened alert status which will require all project vessels to operate at slow speeds of four knots or less and any non-critical departure plans to be delayed.

(b) If a right whale call is confirmed on the two closest passive acoustic monitoring (PAM) buoys or on any three PAM buoys, all vessels will go into heightened alert status requiring all project vessels to operate at slow speeds of 4 knots or less and any non-critical departure plans to be delayed.

(c) Any whale sighted within or approaching 500 m of a vessel shall result in that vessel using idle speed and/or ceasing all movement. If the vessel is operating dynamic positioning (DP) vessel thrusters, the thrusters will be shut down or reduced to minimal safe operating power. The speed and activity restrictions shall continue until either the observed whale has been confirmed outside of and on a path away from 500 m from the vessel or 30 minutes have passed without another confirmed detection.

(d) Any non-whale marine mammal species detected within or approaching 100 m of a vessel shall result in that vessel using idle speed and/or ceasing all movement. If the vessel is operating DP thrusters, the thrusters will be shut down or reduced to minimal safe operating power. The speed and activity restrictions shall continue until either the observed marine mammal has been confirmed outside and on a path away from 100 m from the activity or 30 minutes have passed without another confirmed detection.

(e) All project vessels will remain at least 500 m away from any North Atlantic right whale and at least 100 m away from all other marine mammals. If a marine mammal approaches a stationary vessel, that vessel will sit idle or turn off engines until the marine mammal has left the designated zone or 30 minutes have passed without another confirmed detection.

(f) All vessels shall utilize the International Maritime Organization (IMO)-approved Boston Traffic Separation Scheme (TSS) on their approach to and departure from the Port and/or the unscheduled maintenance/maintenance area at the earliest practicable point of transit in order to avoid the risk of whale strikes.

(g) Repair vessels, dive support vessels (DSVs), and heavy lift vessels (HLVs), will transit at 10 knots (18.5 km/hr) or less in the following seasons and areas, which either correspond to or are more restrictive than the times and areas in NMFS' final rule (73 FR 60173 [October 10, 2008]) to implement speed restrictions to reduce the likelihood and severity of ship strikes of right whales:

- Cape Cod Bay (CCB) Seasonal Management Area (SMA) from January 1 through May 15, which includes all waters in CCB, extending to all shorelines of Massachusetts Bay, with a northern boundary of 42°12′ N. latitude;
- Off Race Point SMA year round, which is bounded by straight lines connecting the following coordinates in the order stated: 42°30′ N. 69°45′ W.; thence to 42°30′ N. 70°30′ W.; thence to 42°12′ N. 70°30′ W.; thence to 42°12′ N.

70°12′ W.; thence to 42°04′56.5″ N. 70°12′ W.; thence along mean high water line and inshore limits of collision regulations (COLREGS) limit to a latitude of 41°40′ N.; thence due east to 41°41′ N. 69°45′ W.; thence back to starting point; and

- Great South Channel (GSC) SMA from April 1 through July 31, which is bounded by straight lines connecting the following coordinates in the order stated:

42°30′ N. 69°45′ W.
41°40′ N. 69°45′ W.
41°00′ N. 69°05′ W.
42°09′ N. 67°08′ 24″ W.
42°30′ N. 67°27′ W.
42°30′ N. 69°45′ W.

(h) All vessels transiting to and from the project area shall report their activities to the mandatory reporting Section of the USCG to remain apprised of North Atlantic right whale movements within the area. All vessels entering and exiting the Mandatory Ship Reporting Area (MSRA) shall report their activities to the USCG's northeast whale reporting system: WHALESNORTH. Vessel operators shall contact the USCG by standard procedures promulgated through the Notice to Mariner system. Information regarding the geographical boundaries and reporting details can be found at: *http://www.fisheries.noaa.gov/pr/shipstrike/msr.htm.*

(i) Prior to leaving the dock to begin transit, the project vessel must contact one of the protected species observers (PSOs) on watch to receive an update of sightings within the visual observation area. If the PSO has observed a North Atlantic right whale within 30 minutes of the transit start, the vessel will hold for 30 minutes and again get a clearance to leave from the PSOs on board. PSOs will assess whale activity and visual observation ability at the time of the transit request to clear the barge for release.

(j) No vessels will transit from shore to the project site during nighttime or when visibility is reduced below 1,000 m, unless an emergency situation requires the vessel to transit during those times. Should transit at night be required, the maximum speed will be 5 knots (9.3 km/hr).

(k) All vessels will consult NAVTEX, NOAA Weather Radio, the NOAA Right Whale SAS or other means to obtain current large whale sighting information.

(l) If member of the crew visually detects a marine mammal within the zone of influence (ZOI) (3.45 km), they will alert the lead PSO on watch who shall then relay the sighting information to the other vessels to document take, determine if mitigation actions are necessary, as required by this IHA, and ensure action(s) can be taken to avoid physical contact with marine mammals.

(m) In response to any whale sightings or acoustic detections, and taking into account exceptional circumstances, all vessels shall actively communicate with the lead PSO and will take appropriate actions to minimize the risk of striking whales.

(n) Neptune must immediately suspend any repair, maintenance, or decommissioning activities if a dead or injured marine mammal is found in the vicinity of the project area, and the death or injury of the animal could be attributable to the LNG facility activities. Neptune must contact NMFS and the Greater Atlantic Regional Office (GARFO) Marine Mammal Stranding and Disentanglement Program. Activities will not resume until review and approval has been given by NMFS.

(o) Use of lights during repair or maintenance activities shall be limited to areas where work is actually occurring, and all other lights must be extinguished. Lights must be downshielded to illuminate the deck and shall not intentionally illuminate surrounding waters, so as not to attract whales or their prey to the area.

(p) Transit route, destination, sea conditions and any marine mammal sightings/mitigation actions during watch shall be recorded in the log book.

(q) The material barges and tugs used in Port repair, maintenance, and decommissioning shall transit from the operations dock to the work sites during daylight hours when possible provided the safety of the vessels is not compromised. Should transit at night be required, the maximum speed of the tug shall be 5 knots.

(r) All repair vessels must maintain a speed of 10 knots or less during daylight hours. All vessels shall operate at 5 knots or less at all times within 5 km of the maintenance, repair, or decommissioning area.

5. Monitoring

The holder of this Authorization is required to conduct marine mammal monitoring during port maintenance, repair, and decommissioning. Monitoring and reporting shall be conducted in accordance with the Monitoring Plan (see Application).

Visual Monitoring

(a) All vessel crew members will undergo environmental training. Crew members who will act as designated watch personnel during heightened awareness conditions will receive specialized observer training.

(b) All vessel operation requirements, guidelines and mitigation requirements will be clearly posted on the bridge of all project vessels.

(c) Neptune or its contractor shall provide a half-day training course to designated crew members assigned to the transit barges and other support vessels. This course shall cover topics including, but not limited to, descriptions of the marine mammals found in the area, mitigation and monitoring requirements contained in this Authorization, sighting log requirements, and procedures for reporting injured or dead marine mammals. These designated crew members shall be required to keep watch on the bridge and immediately notify the navigator of any whale sightings. All watch crew shall sign into a bridge log book upon start and end of watch. Transit route, destination, sea conditions, and any protected species sightings/mitigation actions during watch shall be recorded in the log book.

(d) Each DP vessel will employ three professional PSOs. Two PSOs will conduct continual visual watches on a shift basis during all daylight hours. Daytime PSOs will monitor the acoustic alert program when not on active visual watch. During the night, one PSO will monitor the acoustic alert program and will scan the area around the vessel using a thermal imaging or similar enhancement device for 15 minutes each hour.

(e) All professional PSOs will be approved by NMFS prior to the start of the project, will have at least one full year of marine mammal observation experience in the U.S. Atlantic, Pacific, or Gulf of Mexico, and will have experience in acoustic monitoring and baleen whale detection.

(f) Each non-DP vessel will designate one trained crew member to stand a dedicated watch during all vessel movement and during times of heightened awareness. All designated crew watch personnel will undergo a full day of project-specific mitigation and monitoring training alongside the professional PSOs.

(g) PSOs will be responsible for advising vessel crew members on the required operating procedures and mitigation measures that are defined in this IHA. PSOs will be responsible for providing the required observation and detection data during the decommissioning activities.

(h) Neptune shall maintain a passive acoustic monitoring array consisting of four near real-time autonomous recording units (ARUs) strategically placed around the north and south buoys.

(i) If a whale call detection alert is received, the PSO will review the data and confirm the signal is a whale call. Upon verification, the PSO will monitor the other buoys for call detections. If the PSO verifies detections from two other buoys, then it will be determined that a whale is within the heightened awareness area. Mitigation measures for acoustic detection of whales will be the same as those for visual detection described above.

6. Reporting

The holder of this Authorization is required to:

(a) Submit a draft report on all monitoring conducted under the IHA within ninety calendar days of the completion of marine mammal and acoustic monitoring or sixty days prior to the issuance of any subsequent IHA for this project, whichever comes first. A final report shall be prepared and submitted within thirty days following resolution of comments on the draft report from NMFS. This report must contain the informational elements described in the Monitoring Plan, at minimum (see attached), and shall also include:

(i) Location (in longitude and latitude coordinates), time, and the nature of the maintenance and repair activities;

(ii) Indication of whether a DP system was operated, and if so, the number of thrusters being used and the time and duration of DP vessel operation;

(iii) Marine mammals observed in the within the ZOI (3.45 km in all directions) (number, species, age group, and initial behavior);

(iv) The distance of observed marine mammals from the maintenance, repair, or decommissioning activities;

(v) Changes, if any, in marine mammal behaviors during the observation;

(vi) A description of any mitigation measures (power-down, shutdown, etc.) implemented;

(vii) Weather condition (Beaufort sea state, wind speed, wind direction, ambient temperature, precipitation, and percent cloud cover, etc.);

(viii) Condition of the observation (visibility and glare); and

(ix) Details of passive acoustic detections and any action taken in response to those detections.

(b) Reporting injured or dead marine mammals:

(i) In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by this IHA, such as an injury (Level A harassment), serious injury, or mortality, Neptune shall immediately cease the specified activities and report the incident to the Office of Protected Resources (301–427–8401), NMFS, and the GARFO Marine Mammal Stranding Coordinator (978–281–9300). The report must include the following information:

1. Time and date of the incident;
2. Description of the incident;
3. Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility);
4. Description of all marine mammal observations and active sound source use in the 24 hours preceding the incident;
5. Species identification or description of the animal(s) involved;
6. Fate of the animal(s); and
7. Photographs or video footage of the animal(s).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with Neptune to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. Neptune may not resume their activities until notified by NMFS.

(ii) In the event that Neptune discovers an injured or dead marine mammal, and the lead observer determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.,* in less than a moderate state of decomposition), Neptune shall immediately report the incident to the Office of Protected Resources, NMFS, and the GARFO Stranding Coordinator, NMFS.

The report must include the same information identified in 6(b)(i) of this IHA. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with Neptune to determine whether additional mitigation measures or modifications to the activities are appropriate.

(iii) In the event that Neptune discovers an injured or dead marine mammal, and the lead observer determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), Neptune shall report the incident to the Office of Protected Resources, NMFS, and the GARFO Stranding Coordinator, NMFS, within 24 hours of the discovery. Neptune shall provide photographs or video footage or other documentation of the stranded animal sighting to NMFS.

7. This Authorization may be modified, suspended or withdrawn if the holder fails to abide by the conditions prescribed herein, or if NMFS determines the authorized taking is having more than a negligible impact on the species or stock of affected marine mammals.

Dated: August 22, 2016.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2016–20407 Filed 8–24–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Fishery Products Subject to Trade Restrictions Pursuant to Certification Under the High Seas Driftnet Fishing (HSDF) Moratorium Protection Act

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before October 24, 2016.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Kristin Rusello, Office of International Affairs and Seafood Inspection, F/IS5, 1315 East-West Highway, Silver Spring, MD 20910, (301) 427–8376, or *kristin.rusello@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a revision per RIN 0648–AY15, approved as an emergency request.

Pursuant to the High Seas Driftnet Fishing Moratorium Protection Act

(Moratorium Protection Act), if certain fish or fish products of a nation are subject to import prohibitions to facilitate enforcement, the National Marine Fisheries Service (NMFS) requires that other fish or fish products from that nation that are not subject to the import prohibitions must be accompanied by documentation of admissibility. A duly authorized official/agent of the applicant's Government must certify that the fish in the shipments being imported into the United States (U.S.) are of a species that are not subject to an import restriction of the U.S. If a nation is identified under the Moratorium Protection Act and fails to receive a certification decision from the Secretary of Commerce, products from that nation that are not subject to the import prohibitions must be accompanied by the documentation of admissibility.

The approved revision added two new requirements. Under the import certification requirements in the final rule, there was a procedure for making comparability findings for nations that are eligible for exporting fish and fish products to the United States. The nations may receive a comparability finding to export fish and fish products to the United States by providing documentation that a nation's bycatch reduction regulatory program is comparable in effectiveness to that of the United States. A comparability finding is valid for four years. In the interim, nations are required to submit progress reports demonstrating that their regulatory programs are still meeting the conditions for a comparability finding.

This proposed revision makes minor modifications to the "certification of admissibility" established in conjunction with the High Seas Driftnet Fishing Moratorium Protection Act final rule (RIN 0648–BA89). This revision also changes the title of the collection and the Certification of Admissibility Form from "Fishery Products Subject to Trade Restrictions Pursuant to Certification under the High Seas Driftnet Fishing Moratorium Protection Act" to "Fishery Products Subject to Trade Restrictions Pursuant to Certification under the High Seas Driftnet Fishing Moratorium Protection Act and the Marine Mammal Protection Act".

This information collection is necessary to comply with the Marine Mammal Protection (MMPA) Act 16 U.S.C. 1371 and 1372 and the final rule RIN 0648–AY15 to implement these provisions within the regulations of 50 CFR 216.24. The MMPA contains provisions to address the incidental mortality and serious injury of marine mammals in both domestic and foreign commercial fisheries. With respect to foreign fisheries, section 101(a)(2) of the MMPA (16 U.S.C. 1371(a)(2)) states that "The Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards. For purposes of applying the preceding sentence, the Secretary [of Commerce] (A) shall insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States."

II. Method of Collection

Submissions will be accepted via email or fax.

III. Data

OMB Control Number: 0648–0651.

Form Number(s): None.

Type of Review: Regular submission (extension of an emergency revision).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 90.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 150 hours.

Estimated Total Annual Cost to Public: $10 in reporting/recordkeeping costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: August 22, 2016.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2016–20402 Filed 8–24–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE816

Permanent Advisory Committee To Advise the U.S. Commissioners to the Western and Central Pacific Fisheries Commission; Meeting Announcement

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public meeting.

SUMMARY: NMFS announces a public meeting of the Permanent Advisory Committee (PAC) to advise the U.S. Commissioners to the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC) on September 14, 2016. Meeting topics are provided under the SUPPLEMENTARY INFORMATION section of this notice. The meeting will be held via conference call. Members of the public may submit written comments; comments may be submitted up to 3 days in advance of the meeting. Mail comments to Emily Crigler at the address provided in the FOR FURTHER INFORMATION CONTACT section below.

DATES: The meeting of the PAC will be held via conference call on September 14, 2016, from 10 a.m. to 12 p.m. HST (or until business is concluded).

ADDRESSES: The public meeting will be conducted via conference call. For details on how to call in to the conference line, please contact Emily Crigler, NMFS Pacific Islands Regional Office; telephone: 808–725–5036; email: *emily.crigler@noaa.gov*. Documents to be considered by the PAC will be sent out via email in advance of the conference call. Please submit contact information to Emily Crigler (telephone: 808–725–5036; email: *emily.crigler@noaa.gov*) at least 3 days in advance of the call to receive documents via email.

FOR FURTHER INFORMATION CONTACT: Emily Crigler, NMFS Pacific Islands Regional Office; 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818; telephone: 808–725–5036; facsimile: 808–725–5215; email: *emily.crigler@noaa.gov*.

SUPPLEMENTARY INFORMATION: In accordance with the Western and

Central Pacific Fisheries Convention Implementation Act (16 U.S.C. 6901 *et seq.*), the Permanent Advisory Committee, or PAC, has been formed to advise the U.S. Commissioners to the WCPFC. Members of the PAC have been appointed by the Secretary of Commerce in consultation with the U.S. Commissioners to the WCPFC. The PAC supports the work of the U.S. National Section to the WCPFC in an advisory capacity. The U.S. National Section is made up of the U.S. Commissioners and the Department of State. NMFS Pacific Islands Regional Office provides administrative and technical support to the PAC in cooperation with the Department of State. More information on the WCPFC, established under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, can be found on the WCPFC Web site: *http://wcpfc.int/.*

Meeting Topics

The purpose of the September 14, 2016, conference call is to discuss outcomes of the 2016 regular session of the WCPFC Scientific Committee (SC12) and to begin soliciting comments on the recently distributed Chair's paper on Harvest Strategy Management Objectives and a Consultative Draft of a Bridging CMM on Tropical Tunas to succeed CMM 2015–01.

Special Accommodations

The conference call is accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Emily Crigler at 808–725–5036 at least ten working days prior to the meeting.

Authority: 16 U.S.C. 6902 *et seq.*

Dated: August 22, 2016.

Emily H. Menashes,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2016–20405 Filed 8–24–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Air Force

Notice of Intent To Prepare a Legislative Environmental Impact Statement for the Nevada Test and Training Range Military Land Withdrawal at Nellis Air Force Base, Nevada

AGENCY: United States Air Force (lead agency) and Bureau of Land Management, United States Department of Energy, United States Fish and Wildlife Service, and Nevada Department of Wildlife (cooperating agencies)

ACTION: Notice of Intent

SUMMARY: The United States Air Force (Air Force) is issuing this notice to notify the public of its intent to prepare a Legislative Environmental Impact Statement (LEIS) for the Nevada Test and Training Range (NTTR) military land withdrawal at Nellis Air Force Base, Nevada. The LEIS is being prepared in accordance with National Environmental Policy Act (NEPA) of 1969; 40 Code of Federal Regulations (CFR), Parts 1500–1508, the Council on Environmental Quality (CEQ) regulations for implementing NEPA; and the Air Force Environmental Impact Analysis Process (EIAP) [32 CFR part 989].

This notice also serves to invite early public and agency participation in determining the scope of environmental issues and alternatives to be analyzed in the LEIS and to identify and eliminate from detailed study the issues which are not significant. To effectively define the full range of issues and concerns to be evaluated in the LEIS, the Air Force is soliciting scoping comments from interested local, state and federal agencies, interested American Indian tribes, and interested members of the public. This NOI also serves to provide early notice of compliance with Executive Order (EO) 11990, "Protection of Wetlands" and EO 11988, "Floodplain Management." State and federal regulatory agencies with special expertise in wetlands and floodplains have been contacted to request comment.

Scoping comments may be submitted to the Air Force at the planned public scoping meetings and/or in writing.

DATES: The Air Force plans to hold five public scoping meetings from 5 p.m. to 9 p.m., on the dates and at the locations listed below.

- Wednesday, October 12, 2016: Beatty Community Center, 100 A Avenue South, Beatty, NV 89003
- Thursday, October 13, 2016: Tonopah Convention Center, 301 Brougher Avenue, Tonopah, NV 89049
- Tuesday, October 18, 2016: Caliente Elementary School, 289 Lincoln Street, Caliente, NV 89008
- Wednesday, October 19, 2016: Pahranagat Valley High School, 151 S. Main Street, Alamo, NV 89001
- Thursday, October 20, 2016: Aliante Hotel, 7300 Aliante Parkway, North Las Vegas, NV 89084

The agenda for each scoping meeting is as follows:

- 5:00 p.m. to 6:30 p.m.—Open House and comment submission
- 6:30 p.m. to 7:00 p.m.—Air Force Presentation
- 7:00 p.m. to 9:00 p.m.—Open House and comment submission resumes

Local notices announcing scheduled dates, locations, and addresses for each meeting will be published in the Bullseye, Pahrump Valley Times, Lincoln County Record, Tonopah Times-Bonanza, and Las Vegas Review-Journal newspapers a minimum of fifteen (15) days prior to each meeting.

Comments will be accepted at any time during the Environmental Impact Analysis Process (EIAP). However, to ensure the Air Force has sufficient time to consider public input in the preparation of the Draft LEIS, scoping comments must be submitted no later than December 10, 2016.

ADDRESSES: Information on the NTTR Military Land Withdrawal and LEIS process can be accessed at the project Web site at *www.nttrleis.com.* The project Web site can be used to submit scoping comments to the Air Force, or comments and inquiries may also be submitted by mail or email to the 99th Air Base Wing Public Affairs, 4430 Grissom Ave., Ste. 107, Nellis AFB, NV 89191 or by email at *99ABW.PAOutreach@us.af.mil.*

SUPPLEMENTARY INFORMATION: The current NTTR land withdrawal expires in November, 2021. In accordance with the Military Lands Withdrawal Act of 1999, the Air Force has notified Congress of a continuing military need for the NTTR withdrawal. Military land withdrawal applications have been prepared and submitted to Bureau of Land Management (BLM). The segregation of lands proposed for military withdrawal are addressed in a separate BLM **Federal Register** notice.

The Air Force LEIS supports Congressional decision-making for the proposed military land withdrawal and will be programmatic in nature, adding value by setting out a broad view of environmental impacts and alternatives for Congress to consider. Following Congressional action on the NTTR land withdrawal proposals, site specific proposals based on particular DoD or Air Force defined needs for the range would be evaluated with the appropriate level of tiered or supplemental NEPA.

In particular, the LEIS will analyze alternatives for military land withdrawal of the NTTR to improve the range capacity and capability to support military test and training requirements now and into the future. The LEIS will assess the potential environmental consequences of the proposal to extend the existing NTTR military land withdrawal beyond the current withdrawal expiration date. As part of the withdrawal extension, the Air Force proposes to continue military operations on the NTTR's existing 2,949,603 acres of land. In addition to extending the existing land withdrawal, the Air Force is also proposing to withdraw up to an additional 301,507 acres to improve the range's capacity to support military testing and training.

The alternatives being evaluated in the LEIS include: (1) Extending the existing land withdrawal and management of the NTTR (Status Quo); (2) extending the existing land withdrawal and providing the Air Force with increased access for military activities in the South Range of the NTTR; (3) Alternative 1 or 2 and expanding the existing withdrawal by including up to 301,507 additional acres, via three sub-alternatives; (4) establishing the time period of the withdrawal as either 20 years, 50 years, or as an indefinite military withdrawal; and (5) the No Action alternative which includes returning NTTR lands to the public domain, through the Department of the Interior. The alternatives structure allows for combining elements of alternatives in an additive fashion. For example, Alternative 2, could be selected along with sub-alternatives of Alternatives 3 (an option for expansion) and 4 (option for duration) as part of the Air Force's recommendation to Congress for the future military withdrawal. Within the framework of these alternatives, the LEIS will support Congressional action by identifying and evaluating potential impacts to land use, airspace, safety, noise, hazardous materials and solid waste, earth resources, water resources, air quality, transportation, wilderness and wilderness study areas, cultural resources, biological resources, socioeconomics, and environmental justice.

Henry Williams,

Acting Air Force Federal Register Officer.

[FR Doc. 2016–20401 Filed 8–24–16; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2016–ICCD–0068]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Carl D. Perkins Career and Technical Education Improvement Act of 2006 (Pub. L. 109–270) State Plan Guide

AGENCY: Office of Career, Technical, and Adult Education (OCTAE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before September 26, 2016.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2016–ICCD–0068. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E–349, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Braden Goetz, 202–245–7405.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Carl D. Perkins Career and Technical Education Improvement Act of 2006 (P.L. 109–270) State Plan Guide.

OMB Control Number: 1830–0029.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 56.

Total Estimated Number of Annual Burden Hours: 2,240.

Abstract: This information collection solicits from all eligible States and outlying areas the State plans required under Title I of the Carl D. Perkins Career and Technical Education Act of 2006 (Perkins IV) (P.L. 109–270), as well as, for those States and outlying areas that fail to meet 90 percent of their performance levels for an indicator for three consecutive years, periodic reports on their progress in implementing the improvement plans required by section 123(a)(1) of Perkins IV.

Dated: August 22, 2016.

Tomakie Washington,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2016–20370 Filed 8–24–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Desert Southwest Region Transmission, Transmission Losses, Unreserved Use Penalties, and Ancillary Services—Rate Order No. WAPA–175

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of Final Formula Rates for Transmission and Ancillary Services.

SUMMARY: The Deputy Secretary of Energy has confirmed and approved Rate Order No. WAPA–175 and Rate Schedules PD–NTS4 and INT–NTS4, placing formula rates for Network Integration Transmission Service (Network) on the Parker-Davis Project (P–DP) and Pacific Northwest-Pacific Southwest Intertie Project (Intertie) of the Western Area Power Administration (WAPA) into effect on an interim basis. The Deputy Secretary also confirmed and approved Rate Schedules DSW–TL1, DSW–UU1, DSW–SD4, DSW–RS4, DSW–FR4, DSW–EI4, DSW–SPR4, DSW–SUR4, and DSW–GI2, placing formula rates for transmission losses, unreserved use penalties, and ancillary services from WAPA's Desert Southwest Region (DSW) and Western Area Lower Colorado Balancing Authority (WALC) into effect on an interim basis. The provisional formula rates will provide sufficient revenue to pay all annual costs, including interest expense, and repay applicable investments within the allowable periods.

DATES: Rate Schedules PD–NTS4, INT–NTS4, DSW–TL1, DSW–UU1, DSW–SD4, DSW–RS4, DSW–FR4, DSW–EI4, DSW–SPR4, DSW–SUR4, and DSW–GI2 are effective on the first day of the first full billing period beginning on or after October 1, 2016, and will remain in effect through September 30, 2021, pending approval by the Federal Energy Regulatory Commission (FERC) on a final basis or until superseded.

FOR FURTHER INFORMATION CONTACT: Mr. Ronald E. Moulton, Regional Manager, Desert Southwest Region, Western Area Power Administration, P.O. Box 6457, Phoenix, AZ 85005–6457, (602) 605–2453, or Mr. Scott Lund, Rates Manager, Desert Southwest Region, Western Area Power Administration, P.O. Box 6457, Phoenix, AZ 85005–6457, (602) 605–2442, email *slund@wapa.gov.*

SUPPLEMENTARY INFORMATION: WAPA's DSW published a **Federal Register** notice on February 3, 2016 (81 FR 5741), announcing the proposed formula rates, initiating a public consultation and comment period, and setting forth the date and location of public information and comment forums. On February 4, 2016, customers and interested parties were provided a copy of the published notice. WAPA's DSW held both forums in Phoenix, Arizona, on March 30, 2016.

The previous Rate Schedules PD–NTS3, INT–NTS3, DSW–SD3, DSW–RS3, DSW–FR3, DSW–EI3, DSW–SPR3, DSW–SUR3, and DSW–GI1 for Rate Order No. WAPA–151 were approved by FERC for a 5-year period through September 30, 2016.[1] Several of these rate schedules contain formula rates that were calculated each year to include the most recent financial, load, and schedule information, as applicable. The new rate schedules continue this approach.

Transmission Services

Rate Schedules PD–NTS4 and INT–NTS4 for Network on the P–DP and Intertie are based on a revenue requirement that recovers the costs for providing transmission service. This includes the costs for scheduling, system control, and dispatch service needed to provide the transmission service.

Rate Schedule DSW–TL1 for Transmission Losses is a new rate schedule that provides for the recovery of losses associated with transmission service. Previously, losses were addressed in the transmission service rate schedules for each project administered by WAPA's DSW.

Rate Schedule DSW–UU1 for Unreserved Use Penalties is also a new rate schedule that provides for a penalty, in addition to the usual charge for transmission service, for the use of transmission capacity that has not been reserved or has been used in excess of the amount reserved. Previously, penalty provisions for unauthorized use were included in the transmission service rate schedules for each project administered by WAPA's DSW.

Ancillary Services

DSW provides seven ancillary services pursuant to WAPA's Open Access Transmission Tariff (OATT). These services include: (1) Scheduling, System Control, and Dispatch (DSW–SD4); (2) Reactive Supply and Voltage Control (DSW–RS4); (3) Regulation and Frequency Response (DSW–FR4); (4) Energy Imbalance (DSW–EI4); (5) Spinning Reserve (DSW–SPR4); (6) Supplemental Reserve (DSW–SUR4), and (7) Generator Imbalance (DSW–GI2).

Changes were made to the formula rates for Regulation and Frequency Response, Energy Imbalance, and Generator Imbalance. The formula rate for Regulation and Frequency Response now includes the application of variable capacity multipliers to the installed capacity of variable energy resources. The formula rates for Energy Imbalance and Generator Imbalance now have the same bandwidth structure for on-peak and off-peak hours. No changes were made to the formula rates for the other ancillary services. Minor editorial changes were made to rate schedule language to provide clarification and make them more uniform and consistent.

By Delegation Order No. 00–037.00A, effective October 25, 2013, the Secretary of Energy delegated: (1) The authority to develop power and transmission rates to the Administrator of WAPA; (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy; and (3) the authority to confirm, approve, and place into effect on a final basis, to remand or to disapprove such rates to FERC. Federal rules (10 CFR part 903) govern Department of Energy procedures for public participation in power and transmission rate adjustments.

Under Delegation Order Nos. 00–037.00A and 00–001.00F and in compliance with 10 CFR part 903 and 18 CFR part 300, I hereby confirm, approve, and place Rate Order No. WAPA–175, which provides the formula rates for DSW transmission, transmission losses, unreserved use penalties, and ancillary services into effect on an interim basis. The new Rate Schedules PD–NTS4, INT–NTS4, DSW–TL1, DSW–UU1, DSW–SD4, DSW–RS4, DSW–FR4, DSW–EI4, DSW–SPR4, DSW–SUR4, and DSW–GI2 will be submitted promptly to FERC for confirmation and approval on a final basis.

Dated: August 18, 2016.

Elizabeth Sherwood-Randall,

Deputy Secretary of Energy.

DEPARTMENT OF ENERGY

DEPUTY SECRETARY

In the matter of: Western Area Power Administration, Desert Southwest Region, Rate Adjustment for Transmission Service, Transmission Losses, Unreserved Use Penalties, and Ancillary Services.

Rate Order No. WAPA–175

ORDER CONFIRMING, APPROVING, AND PLACING FORMULA RATES FOR TRANSMISSION SERVICE, TRANSMISSION LOSSES, UNRESERVED USE PENALTIES, AND ANCILLARY SERVICES INTO EFFECT ON AN INTERIM BASIS

The formula rates set forth in this order are established pursuant to Section 302 of the Department of Energy (DOE) Organization Act (42 U.S.C. 7152). This act transferred to and vested in the Secretary of Energy the power marketing functions of the Secretary of the Department of the Interior and the Bureau of Reclamation under the

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[1] Rate Order No. WAPA–151 was approved by FERC on a final basis on March 5, 2012, in Docket No. EF11–14–000 (138 FERC ¶ 62,198).

Reclamation Act of 1902 (ch. 1093, 32 Stat. 388), as amended and supplemented by subsequent laws, particularly section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)) and other acts that specifically apply to the projects involved.

By Delegation Order No. 00-037.00A, effective October 25, 2013, the Secretary of Energy delegated: (1) the authority to develop power and transmission rates to the Administrator of the Western Area Power Administration (WAPA); (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy; and (3) the authority to confirm, approve, and place into effect on a final basis, to remand or to disapprove such rates to the Federal Energy Regulatory Commission (FERC). Federal rules (10 CFR part 903) govern DOE procedures for public participation in power and transmission rate adjustments.

Acronyms and Definitions

As used in this Rate Order, the following acronyms and definitions apply:

Balancing Authority (BA)	The responsible entity that integrates resource plans ahead of time, maintains load-interchange-generation balance within a Balancing Authority Area, and supports interconnection frequency in real-time.
Balancing Authority (BA) Area	The collection of generation, transmission, and loads within the metered boundaries of the Balancing Authority.
DOE	United States Department of Energy.
DSW	Desert Southwest Region.
FERC	Federal Energy Regulatory Commission.
Kilowatt (kW)	Electrical unit of capacity equal to 1,000 watts.
Megawatt (MW)	Electrical unit of capacity equal to 1,000 kW or 1,000,000 watts.
Network	Network Integration Transmission Service.
OATT	WAPA's revised Open Access Transmission Tariff, effective May 13, 2013.
Open Access Same-Time Informaton System (OASIS).	An electronic posting system that a service provider maintains for transmission access data that allows users to view information simultaneously.
Transmission Service Provider (TSP)	Any utility that owns, operates, or controls facilities used to transmit electric energy.
VAR	Volt-Ampere Reactive, a unit by which reactive power is expressed.
VER	Variable energy resources.
WALC	Western Area Lower Colorado Balancing Authority.
WAPA	Western Area Power Administration.

Effective Date

The provisional formula rates are effective on the first day of the first full billing period beginning on or after October 1, 2016, and will remain in effect through September 30, 2021, pending approval by FERC on a final basis or until superseded.

Public Notice and Comment

WAPA followed the Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions, 10 CFR part 903, in developing these formula rates and schedules. WAPA took the following steps to involve the public in the rate adjustment process:

1. On July 2, 2015, WAPA notified DSW customers and interested parties by email of an informal meeting and posted this notice on its public website. On August 10, 2015, WAPA held an informal meeting to discuss DSW's rate proposals for transmission and ancillary services.

2. WAPA published a **Federal Register** notice on February 3, 2016 (81 FR 5741), announcing the proposed formula rates, initiating the 90-day public consultation and comment period, setting forth the date and location of public information and public comment forums, and outlining the procedures for public participation.

3. On February 4, 2016, WAPA sent DSW customers and interested parties a copy of the notice.

4. On March 30, 2016, WAPA held a public information forum in Phoenix, Arizona. WAPA's DSW representatives explained the need for the formula rate adjustment and proposed changes to the formula rates, answered questions, and provided presentation handouts.

5. On March 30, 2016, following the public information forum, WAPA held a public comment forum in Phoenix, Arizona, to provide customers and interested parties an opportunity to comment for the record.

6. WAPA established a public website to post information about this rate adjustment. The website is located at *https://www.wapa.gov/regions/DSW/Rates/Pages/ancillary-rates.aspx.*

Comments

No oral comments were made at the public comment forum. WAPA received one written comment during the consultation and comment period. A written comment was received from Arizona Generation and Transmission Cooperatives, Benson, Arizona. The comment has been considered in preparing this Rate Order

Project Descriptions

WAPA's DSW provides ancillary services through WALC, which encompasses the projects within its marketing area—Boulder Canyon Project (BCP), Parker-Davis Project (P–DP), Central Arizona Project (CAP), and the Pacific Northwest-Pacific Southwest Intertie Project (Intertie). Network is offered on the P–DP, CAP, and Intertie.

BCP

Hoover Dam, authorized by the Boulder Canyon Project Act (45 Stat. 1057, December 21, 1928), sits on the Colorado River along the Arizona-Nevada border. Hoover Dam's power plant has 19 generating units (two for plant use) and an installed capacity of 2,078,800 kW (4,800 kW for plant use). High-voltage transmission lines and substations make it possible to deliver this power to southern Nevada, Arizona, and southern California.

P–DP

P–DP was formed by consolidating two projects, Davis Dam and Parker Dam, under terms of the Act of May 28, 1954 (68 Stat. 143). Davis Dam's power plant has five generating units and an installed capacity of 255,000 kW. Parker Dam's power plant has four generating units and an installed capacity of 120,000 kW. P–DP is operated in conjunction with the other Federal hydroelectric generation facilities in the Colorado River Basin. The project also includes 1,535 circuit miles of transmission lines in Arizona, southern Nevada, and along the Colorado River in California.

CAP

Congress authorized CAP in 1968 to improve water resources in the Colorado River Basin (43 U.S.C. 1501). The legislation also authorized Federal participation in the Navajo Generating Station, which has three coal-fired steam electric generating units with a combined capacity of 2,250,000 kW. The 24.3 percent Federal share (546,750 kW) of the Navajo Generating Station is used to power the pumps that move Colorado River water through the CAP canals.

Intertie

Intertie was authorized by Section 8 of the Pacific Northwest Power Marketing Act of August 31, 1964 (16 U.S.C. 837g). WAPA's portion of the Intertie consists of two parts, a northern portion and a southern portion. The northern portion is administered by WAPA's Sierra Nevada Region. The southern portion is administered by WAPA's DSW and consists of 865 circuit miles of extra high-voltage and 108 circuit miles of high-voltage transmission lines in Arizona, southern Nevada, and southern California.

Existing and Provisional Formula Rates

The existing formula rates contained in Rate Schedules PD–NTS3, INT–NTS3, DSW–SD3, DSW–RS3, DSW–FR3, DSW–EI3, DSW–SPR3, DSW–SUR3, and DSW–GI1 expire on September 30, 2016. Several of these rate schedules contain formula rates that are calculated each fiscal year to include the most recent financial, load, and schedule information, as applicable. The new rate schedules continue with this approach.

Network

The existing formula rates for Network on the P–DP and Intertie under Rate Schedules PD–NTS3 and INT–NTS3, respectively, are the following:

$$\boxed{\text{Monthly Charge} = \text{Network Customer's Load-Ratio Share} \times \frac{\text{Annual Transmission Revenue Requirement}}{12}}$$

The provisional formula rates for Network on the P–DP and Intertie under Rate Schedules PD–NTS4 and INT–NTS4 remain the same without adjustment.

Transmission Losses

Rate Schedule DSW–TL1 is a new schedule that consolidates the provisions for transmission losses. This rate schedule will supersede the existing losses provisions in the separate transmission rate schedules for each project. The current loss percentages and their application remain unchanged.

Unreserved Use Penalties

Rate Schedule DSW–UU1 is a new schedule that unifies and consolidates the penalty provisions for unreserved use. This rate schedule will supersede the existing unauthorized or unreserved use provisions in the separate transmission rate schedules for each project.

Scheduling, System Control, and Dispatch

The existing formula rate for this service under Rate Schedule DSW–SD3 is the following:

$$\boxed{\text{Charge per Schedule} = \frac{\text{Annual Cost of Scheduling Personnel and Related Costs}}{\text{Number of Schedules per Year}}}$$

The provisional formula rate for this service under Rate Schedule DSW–SD4 remains the same without adjustment.

Reactive Supply and Voltage Control

The existing formula rate for this service under Rate Schedule DSW–RS3 is the following:

$$\boxed{\text{VAR Support Service Rate} = \frac{\text{Annual Revenue Requirement for VAR Support}}{\text{Transmission Transactions Requiring VAR}}}$$

The provisional formula rate for this service under Rate Schedule DSW–RS4 remains the same without adjustment.

Regulation and Frequency Response

The existing formula rate for this service under Rate Schedule DSW–FR3 is the following:

$$\text{Regulation Service Rate} = \frac{\text{Annual Revenue Requirement for Regulation Service}}{\text{Load within WALC Requiring Regulation} + \text{Installed Nameplate Capacity of Intermittent Resources}}$$

The provisional formula rate for this service under Rate Schedule DSW-FR4 is the following:

$$\text{Regulation Service Rate} = \frac{\text{Annual Revenue Requirement for Regulation Service}}{\begin{gathered}\text{Load within WALC Requiring Regulation}\\ + \\ \text{(Installed Nameplate Capacity of Solar Generators}\\ \text{Serving Load within WALC} \times \text{Solar Capacity Multiplier)}\\ + \\ \text{(Installed Nameplate Capacity of Wind Generators}\\ \text{Serving Load within WALC} \times \text{Wind Capacity Multiplier)}\end{gathered}}$$

Energy Imbalance

The existing formula rate for this service under Rate Schedule DSW–EI3 is the following:

Deviation bands	Settlements
On-Peak Hours	
Deviations less than or equal to ±1.5% (with a 4 MW minimum) of metered load.	100% (no penalty).
Deviations greater than ±1.5% up to 7.5% (or greater than 4 MW to 10 MW) of metered load.	90% for over-deliveries and 110% for under-deliveries (10% penalty).
Deviations greater than ±7.5% (or 10 MW) of metered load	75% for over-deliveries and 125% for under-deliveries (25% penalty).
Off-Peak Hours	
Deviations less than or equal to +7.5% (with a 2 MW minimum) of metered load.	60% for over-delivery (40% penalty).
Deviations less than or equal to −3.0% (with a 5 MW minimum) of metered load.	110% for under-delivery (10% penalty).

The provisional formula rate for this service under Rate Schedule DSW–EI4 is the following

Deviation bands	Settlements
On-Peak Hours	
No Changes	No Changes.
Off-Peak Hours	
Deviations less than or equal to ±1.5% (with a 4 MW minimum) of metered load.	100% (no penalty).
Deviations greater than ±1.5% up to 7.5% (or greater than 4 MW to 10 MW) of metered load.	75% for over-deliveries (25% penalty), 110% for under-deliveries (10% penalty).
Deviations greater than ±7.5% (or 10 MW) of metered load	60% for over-deliveries (40% penalty), 125% for under-deliveries (25% penalty).

Operating Reserves—Spinning and Supplemental

The existing formula rates for these services under Rate Schedules DSW–SPR3 and DSW–SUR3 are the following:

$$\boxed{\text{Cost of Service} = \text{Market Price} + \text{Administrative Fee}}$$

The provisional formula rates for these services under Rate Schedules DSW–SPR4 and DSW–SUR4 remain the same without adjustment.

Generator Imbalance

The existing formula rate for this service under Rate Schedule DSW–GI1 is the following:

Deviation bands	Settlements
On-Peak Hours	
Deviations less than or equal to ±1.5% (with a 4 MW minimum) of metered generation.	100% (no penalty).
Deviations greater than ±1.5% up to 7.5% (or greater than 4 MW to 10 MW) of metered generation.	90% for over-deliveries and 110%, for under-deliveries (10% penalty).
Deviations greater than ±7.5% (or 10 MW) of metered generation	75% for over-deliveries and 125%, for under-deliveries (25% penalty).
Off-Peak Hours	
Deviations less than or equal to +7.5% (with a 2 MW minimum) of metered generation.	60% for over-delivery (40% penalty).
Deviations less than or equal to −3.0% (with a 5 MW minimum) of metered generation.	110% for under-delivery (10% penalty).

The provisional formula rate for this service under Rate Schedule DSW–GI2 is the following:

Deviation bands	Settlements
On-Peak Hours	
No Changes	No Changes.
Off-Peak Hours	
Deviations less than or equal to ±1.5%, (with a 4 MW minimum) of metered generation.	100% (no penalty).
Deviations greater than ±1.5% up to 7.5% (or greater than 4 MW to 10 MW) of metered generation.	75% for over-deliveries (25% penalty), 110% for under-deliveries (10% penalty).
Deviations greater than ±7.5% (or 10 MW) of metered generation	60% for over-deliveries (40% penalty), 125% for under-deliveries (25% penalty).

Certification of Rates

WAPA's Administrator certified that the provisional formula rates for Network, transmission losses, unreserved use penalties, and ancillary services under Rate Schedules PD–NTS4, INT–NTS4, DSW–TL1, DSW–UU1, DSW–SD4, DSW–RS4, DSW–FR4, DSW–EI4, DSW–SPR4, DSW–SUR4, and DSW–GI2 result in the lowest possible rates consistent with sound business principles. The provisional formula rates were developed following administrative policies and applicable laws.

Transmission Services Discussion

Network

DSW offers Network to eligible customers, subject to the provisions in WAPA's OATT, from the P–DP, Intertie, and CAP transmission systems. This service includes the transmission of energy to points of delivery on the P–DP, Intertie, and CAP interconnected high-voltage systems, which includes transmission lines, substations, communication equipment and related facilities. The provisional formula rates only apply to Network from the P–DP and Intertie transmission systems. The formula rate for Network from the CAP transmission system was approved under Rate Order No. WAPA–172 and became effective on January 1, 2016.[2] The formula rate for Network from CAP is identical to the provisional formula rates for P–DP and Intertie.

The monthly charge for Network is the product of the customer's load-ratio share and one-twelfth (1⁄12) of the annual revenue requirement for the appropriate transmission system. The load-ratio share is equal to the customer's hourly load coincident with the monthly transmission system peak hour. The monthly transmission system peak hour occurs when the metered load for all network service customers is the greatest. The metered load and the transmission system load at the peak hour are averaged on a rolling 12-month basis (12–CP). No changes were made to the formula rates for Network.

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[2] Rate Order No. WAPA–172 was approved by the Deputy Secretary of Energy on December 21, 2015, (80 FR 81310, December 29, 2015) and filed with FERC.

Transmission Losses

WALC provides transmission losses to TSPs within its BA Area. Capacity and energy losses occur when a TSP delivers electricity over its transmission facilities for a customer. Losses are assessed for transactions on transmission facilities within WALC.

A single loss percentage for WALC was developed in 2004 and applied to the P–DP, Intertie, and CAP transmission systems. The loss provisions contained in the transmission service rate schedules for each project have been consolidated into a new single rate schedule. No changes were made to the existing loss percentage or application. The transmission loss percentage currently in effect is posted on WALC's OASIS.

Unreserved Use Penalties

Unreserved use occurs when a customer uses transmission service it has not reserved or uses transmission service in excess of its reserved capacity. Unreserved use may also include a customer's failure to curtail transmission when requested.

The penalty provisions for unreserved use in the transmission service rate schedules for each project have been unified and consolidated into a new single rate schedule. The penalty for a customer that engages in unreserved use is two times the maximum allowable firm point-to-point transmission rate for the service at issue, assessed as follows:

(1) The penalty for one instance in a single hour is based on the daily short-term rate;

(2) The penalty for more than one instance for any given duration (*e.g.,* daily) increases to the next longest duration (*e.g.,* weekly).

A transmission customer is also required to pay for all ancillary services provided and associated with the unreserved use. The customer must pay for ancillary services based on the amount of transmission service it used and did not reserve.

Ancillary Services Discussion

In accordance with WAPA's OATT, ancillary services are needed with transmission service to maintain reliability inside and among the BA Areas affected by the transmission service. WAPA's DSW currently provides seven ancillary services under the OATT: (1) Scheduling, System Control and Dispatch; (2) Reactive Supply and Voltage Control; (3) Regulation and Frequency Response; (4) Energy Imbalance; (5) Spinning Reserve; (6) Supplemental Reserve; and (7) Generator Imbalance. The provisional formula rates for these services are designed to recover the costs incurred for providing each of the services.

The first two ancillary services are defined by FERC as services that the TSP is required to provide directly, or indirectly by making arrangements with the BA, and the transmission customer is required to purchase. The remaining five ancillary services are services that the TSP (or the BA who performs the function for the TSP) must offer when transmission is used to serve load within the TSP's BA. The transmission customer must purchase these ancillary services from the TSP, acquire the services from a third party, or self-supply the services.

Scheduling, System Control, and Dispatch

This service is required to schedule the movement of power through, out of, within, or into a BA Area and must be provided by the BA in which the facilities used for transmission are located. WALC will provide this service for all transmission customers within its BA Area.

The charge per schedule per day is calculated by dividing the annual costs associated with scheduling (numerator) by the number of schedules per year (denominator). The numerator includes the costs of transmission scheduling personnel, facilities, equipment, software, and other related costs involved in providing the service. The denominator is the yearly total of daily tags that result in a schedule, excluding schedules that return energy in kind. No changes were made to this formula rate.

Reactive Supply and Voltage Control

This service is required to maintain transmission voltages on DSW's transmission facilities within acceptable limits, using generation facilities and non-generation resources capable of producing (or absorbing) reactive power. This service must be provided for each transaction on the transmission facilities within the BA by the TSP (or the BA who performs this function for the TSP). WALC will perform this service for DSW's transmission system within its BA Area.

The rate is calculated by dividing the annual revenue requirement for the service (numerator) by the transactions requiring the service (denominator). The numerator consists of the annual revenue requirement for generation multiplied by the percentage of resource capacity used for providing the service. That percentage is based on the nameplate power factor (one minus the power factor) for the generating units supplying service within WALC. The denominator consists of the transmission capacity of customers taking this service. No changes were made to this formula rate.

Regulation and Frequency Response

This service is necessary to provide for the continuous balancing of resources, generation and interchange with load, as well as for maintaining scheduled interconnection frequency at sixty cycles per second. The obligation to maintain this balance between resources and load lies with the TSP (or the BA who performs this function for the TSP). DSW (via WALC) must offer this service when transmission is used to serve load within its BA Area.

The rate is calculated by dividing the annual revenue requirement for the service (numerator) by the sum of the load within WALC that requires the service and the generating capacity associated with variable energy resources (denominator). The numerator includes the annual costs associated with plant-in-service, operation and maintenance, purchases of regulation products, purchases of power to support WALC's ability to regulate, and other related costs involved in providing the service. The denominator consists of the load within WALC that requires this service plus the product of the installed nameplate capacity of solar and wind generators serving load within WALC and the applicable capacity multipliers.

The denominator has been changed to include the application of capacity multipliers. Although variable energy resources have not yet impacted WALC, including the multipliers will allow the formula rate to more accurately recover potential future costs from customers by following cost causation principles. WAPA's DSW will set the multipliers at a value of one until variable energy resources begin to adversely impact WALC's regulation needs.

Energy Imbalance

This service is provided when differences occur between the scheduled and the actual delivery of energy to a load located within the BA Area over a single hour. DSW (via WALC) must offer this service when transmission is used to serve load within its BA Area.

The charges for this service are based on a graduated bandwidth structure. The size of the deviation and whether the deviation occurs in on-peak or off-peak hours determines settlement. No changes were made to the deviation bands and settlements for on-peak hours. The bandwidth structure for off-peak hours was changed to consist of three deviation bands, similar to the on-peak structure. This aligns with FERC Order 890 guidelines with appropriate penalty adjustments for WALC operating conditions.

Spinning Reserve

This service is needed to serve load immediately in the event of a system contingency and may be provided by generating units that are on-line and loaded at less than maximum output. DSW (via WALC) must offer this service when transmission is used to serve load within its BA Area.

WALC has no resources available to provide this service. DSW may obtain the service on a pass-through cost basis at market price plus an administrative fee. No changes were made to this formula rate.

Supplemental Reserve

This service is needed to serve load in the event of a system contingency. It is not available immediately to serve load but is generally available within a short period of time after a system contingency event. DSW (via WALC) must offer this service when transmission is used to serve load within its BA Area.

WALC has no resources available to provide this service. DSW may obtain the service on a pass-through cost basis at market price plus an administrative fee. No changes were made to this formula rate.

Generator Imbalance

This service is provided when differences occur between the output of a generator located within the BA Area and a delivery schedule from that generator to another BA Area or a load within the TSP's BA Area over a single hour. DSW (via WALC) must offer this service, to the extent it is physically feasible to do so from its resources or from resources available to it, when transmission is used to deliver energy from a generator located within its BA Area.

The charges for this service are based on a graduated bandwidth structure. The size of the deviation and whether the deviation occurs in on-peak or off-peak hours determines settlement. No changes were made to the deviation bands and settlements for on-peak hours. The bandwidth structure for off-peak hours was changed to consist of three deviation bands, similar to the on-peak structure. This aligns with FERC Order 890 guidelines with appropriate penalty adjustments for WALC operating conditions.

Comments

WAPA's DSW received one comment during the public consultation and comment period. The comment has been paraphrased where appropriate, without compromising the meaning of the comment.

Comment: Customer supports the rates as developed but requests that WAPA clarify the obligation to update service agreements in line with the terms of WAPA's OATT. The customer also asks that WAPA clarify that the new rates and changes to underlying rate formulas constitute a change in formula, indicate to the Deputy Secretary what changes are required to the applicable service agreements, and notify WAPA's customers when the Deputy Secretary approves the rates on an interim basis.

Response: Although WAPA believes its process is sufficiently clear, WAPA will consider clarifying the manner in which it updates service agreements as currently set forth in WAPA's OATT. However, review of WAPA's OATT language is outside the scope of this rate adjustment process. WAPA identifies in the **Federal Register** notice the new rate schedules and the changes that were made to the formula rates for ancillary services. WAPA will notify DSW customers when the Deputy Secretary approves the formula rates on an interim basis.

Availability of Information

All brochures, studies, comments, letters, memorandums and other documents used by WAPA's DSW to develop the provisional formula rates are available for inspection and copying at the Desert Southwest Regional Office, Western Area Power Administration, 615 South 43rd Avenue, Phoenix, Arizona. Many of these documents are available on WAPA's DSW website at: *https://www.wapa.gov/regions/DSW/Rates/Pages/ancillary-rates.aspx.*

RATEMAKING PROCEDURE REQUIREMENTS

Environmental Compliance

In compliance with the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321–4347; the Council on Environmental Quality Regulations for implementing NEPA (40 CFR parts 1500–1508); and DOE NEPA Implementing Procedures and Guidelines (10 CFR part 1021), WAPA has determined that this action is categorically excluded from preparing an environmental assessment or an environmental impact statement.

Determination Under Executive Order 12866

WAPA has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget is required.

Submission to the FERC

The formula rates herein confirmed, approved, and placed into effect on an interim basis, together with supporting documents, will be submitted to FERC for confirmation and final approval.

ORDER

In view of the foregoing and under the authority delegated to me, I confirm and approve on an interim basis, the formula rates under Rate Schedules PD–NTS4, INT–NTS4, DSW–TL1, DSW–UU1, DSW–SD4, DSW–RS4, DSW–FR4, DSW–EI4, DSW–SPR4, DSW–SUR4, and DSW–GI2. These rate schedules are effective the first full billing period on or after October 1, 2016, and will remain in effect through September 30, 2021, pending FERC's confirmation and approval of them or substitute formula rates on a final basis.

Dated: August 18, 2016.

Elizabeth Sherwood-Randall,

Deputy Secretary of Energy.

Rate Schedule PDP–NTS4

ATTACHMENT H to Tariff

(Supersedes Schedule PDP–NTS3)

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

DESERT SOUTHWEST REGION

Parker-Davis Project

NETWORK INTEGRATION TRANSMISSION SERVICE

Effective

The first day of the first full billing period beginning on or after October 1, 2016, and will remain in effect through September 30, 2021, or until superseded.

Applicable

Transmission customers will compensate the Parker-Davis Project each month for Network Integration Transmission Service (Network) under the applicable Network Agreement and the formula rate described herein.

Formula Rate

$$\boxed{\text{Monthly Charge} = \text{Network Customer's Load-Ratio Share} \times \frac{\text{Annual Transmission Revenue Requirement}}{12}}$$

Based on the formula rate, the Annual Transmission Revenue Requirement (ATRR) will be calculated for each fiscal year using updated financial data. The ATRR will be effective on October 1st of each year and posted on Western Area Lower Colorado Balancing Authority's website.

Rate Schedule INT–NTS4

ATTACHMENT H to Tariff

(Supersedes Schedule INT–NTS3)

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

DESERT SOUTHWEST REGION

Pacific Northwest-Pacific Southwest Intertie Project

NETWORK INTEGRATION TRANSMISSION SERVICE

Effective

The first day of the first full billing period beginning on or after October 1, 2016, and will remain in effect through September 30, 2021, or until superseded.

Applicable

Transmission customers will compensate the Pacific Northwest-Pacific Southwest Intertie Project each month for Network Integration Transmission Service (Network) under the applicable Network Agreement and the formula rate described herein.

Formula Rate

$$\boxed{\text{Monthly Charge} = \text{Network Customer's Load-Ratio Share} \times \frac{\text{Annual Transmission Revenue Requirement}}{12}}$$

Based on the formula rate, the Annual Transmission Revenue Requirement (ATRR) will be calculated for each fiscal year using updated financial data. The ATRR will be effective on October 1st of each year and posted on Western Area Lower Colorado Balancing Authority's website.

Rate Schedule DSW–TL1

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

DESERT SOUTHWEST REGION

Western Area Lower Colorado Balancing Authority

TRANSMISSION LOSSES SERVICE

Effective

The first day of the first full billing period beginning on or after October 1, 2016, and will remain in effect through September 30, 2021, or until superseded.

Applicable

Capacity and energy losses occur when a Transmission Service Provider (TSP) delivers electricity over its transmission facilities for a transmission customer. The Western Area Lower Colorado Balancing Authority (WALC) provides this service to TSPs within its Balancing Authority Area. Transmission losses (losses) are assessed for transactions on transmission facilities within WALC, unless separate agreements specify the terms for losses. The losses applicable to Federal TSPs will be passed directly to transmission customers. The transmission customer must either purchase this service from WALC or make alternative comparable arrangements to satisfy their obligations for losses.

Formula Rate

The loss percentage currently in effect is posted on WALC's website and may be changed from time to time. Financial settlement for losses will occur on a monthly basis, unless determined by WALC. Proxy prices used to determine financial settlement will be derived from the Palo Verde electricity price indexes, or similar alternative, for on-peak and off-peak. This pricing information is posted on WALC's website.

Rate Schedule DSW–UU1

SCHEDULE 10 to OATT

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

DESERT SOUTHWEST REGION

Central Arizona Project

Pacific Northwest-Pacific Southwest Intertie Project

Parker-Davis Project

UNRESERVED USE PENALTIES

Effective

The first day of the first full billing period beginning on or after October 1, 2016, and will remain in effect through September 30, 2021, or until superseded.

Applicable

Unreserved use occurs when a customer uses transmission service it has not reserved or uses transmission service in excess of its reserved capacity. Unreserved use may also include a transmission customer's failure to curtail transmission when requested. The transmission customer shall compensate the Federal

Transmission Service Providers (TSP) each month for any unreserved use of the transmission system.

Penalty Rate

The charge for a transmission customer that engages in unreserved use is two times the maximum allowable firm point-to-point transmission rate for the service at issue, assessed as follows:

(1) The penalty for one instance in a single hour is based on the daily rate;

(2) The penalty for more than one instance for any given duration (*e.g.*, daily) increases to the next longest duration (*e.g.*, weekly).

A transmission customer that exceeds its reserved capacity at any point of receipt or point of delivery, or a customer that uses transmission service at a point of receipt or point of delivery that it has not reserved, is required to pay for all ancillary services provided by the Federal TSP and associated with the unreserved use. The customer will pay for ancillary services based on the amount of transmission service it used and did not reserve.

Rate Schedule DSW–SD4

SCHEDULE 1 to OATT

(Supersedes Schedule DSW–SD3)

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

Desert Southwest Region and

Western Area Lower Colorado Balancing Authority

SCHEDULING, SYSTEM CONTROL, AND DISPATCH SERVICE

Effective

The first day of the first full billing period beginning on or after October 1, 2016, and will remain in effect through September 30, 2021, or until superseded.

Applicable

Scheduling, System Control, and Dispatch Service is required to schedule the movement of power through, out of, within, or into the Balancing Authority Area (BA Area). This service can be provided only by the operator in which the transmission facilities used for transmission service are located. The Western Area Lower Colorado Balancing Authority (WALC) performs this service for all Transmission Service Providers (TSPs) within its BA Area. The transmission customer must purchase this service, unless other arrangements are made with WALC.

The charge will be applied to all schedules, except for schedules that return energy in kind to WALC. WALC will accept any number of scheduling changes during the day without additional charge. The charge will be allocated equally among all TSPs, both Federal and non-Federal, listed on schedules inside its BA Area. The Federal transmission segments of the schedule are exempt from invoicing since the costs for these segments are included in applicable transmission service rates.

Formula Rate

$$\boxed{\text{Charge per Schedule} = \frac{\text{Annual Cost of Scheduling Personnel and Related Costs}}{\text{Number of Schedules per Year}}}$$

The charge per schedule per day is calculated by dividing the annual costs associated with scheduling (numerator) by the number of schedules per year (denominator). The numerator is the annual cost of transmission scheduling personnel, facilities, equipment, software, and other related costs involved in providing the service. The denominator is the yearly total of daily tags which result in a schedule, excluding schedules that return energy in kind.

Based on the formula rate, the charge will be calculated each fiscal year using updated financial and schedule data. The charge will be effective on October 1st of each year and posted on WALC's website.

Rate Schedule DSW–RS4

SCHEDULE 2 to OATT

(Supersedes Schedule DSW–RS3)

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

Desert Southwest Region and

Western Area Lower Colorado Balancing Authority

REACTIVE SUPPLY AND VOLTAGE CONTROL FROM GENERATION SOURCES OR OTHER SOURCES SERVICE

Effective

The first day of the first full billing period beginning on or after October 1, 2016, and will remain in effect through September 30, 2021, or until superseded.

Applicable

In order to maintain transmission voltages on the transmission facilities within acceptable limits, generation facilities and non-generation resources capable of providing Reactive Supply and Voltage Control (VAR Support Service) are operated to produce (or absorb) reactive power. This service must be provided for each transaction on the transmission facilities within the Balancing Authority (BA) by the Transmission Service Provider (TSP) or the BA who performs this function for the TSP.

VAR Support Service will be provided by the Western Area Lower Colorado Balancing Authority (WALC). Customers of a Federal TSP must purchase this service from WALC unless the transmission customer has generating resources capable of providing VARs directly to the Federal TSP and has executed a contract stipulating all the provisions of their self-supply. If WALC provides VAR Support Service on behalf of any non-Federal TSP, this service will be assessed on either the non-Federal TSP's reserved capacity or the scheduled quantity of the non-Federal TSP's customers.

Formula Rate

$$\boxed{\text{VAR Support Service Rate} = \frac{\text{Annual Revenue Requirement for VAR Support}}{\text{Transmission Transactions Requiring VAR}}}$$

The numerator consists of the annual revenue requirement for generation multiplied by the percentage of resource capacity used for providing VAR Support Service. That percentage is based on the nameplate power factor (one minus the power factor) for the generating units supplying the service within WALC. The denominator consists of the transmission transactions within WALC that require this service.

Based on the formula rate, the charge will be calculated each fiscal year using updated financial and reservation data. The charge will be effective on October 1st of each year and will be posted on WALC's website.

Rate Schedule DSW–FR4

SCHEDULE 3 to OATT

(Supersedes Schedule DSW–FR3)

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

Desert Southwest Region and

Western Area Lower Colorado Balancing Authority

REGULATION AND FREQUENCY RESPONSE SERVICE

Effective

The first day of the first full billing period beginning on or after October 1, 2016, and will remain in effect through September 30, 2021, or until superseded.

Applicable

Regulation and Frequency Response Service (Regulation Service) is necessary to provide for the continuous balancing of resources, generation and interchange, with load, and for maintaining scheduled interconnection frequency at sixty cycles per second (60 Hz). The obligation to maintain this balance between resources and load lies with the Transmission Service Provider (TSP) or the Balancing Authority (BA) who performs this function for the TSP. The Western Area Lower Colorado Balancing Authority (WALC) performs this function for the Federal TSPs and must offer this service when transmission is used to serve load within its Balancing Authority Area (BA Area). Non-Federal TSPs and customers of Federal TSPs must purchase Regulation Service from WALC or make alternative comparable arrangements to satisfy their regulation obligations.

Formula Rate

$$\boxed{\text{Regulation Service Rate} = \frac{\text{Annual Revenue Requirement for Regulation Service}}{\begin{array}{c}\text{Load within WALC Requiring Regulation}\\ + \\ \text{(Installed Nameplate Capacity of Solar Generators}\\ \text{Serving Load within WALC} \times \text{Solar Capacity Multiplier)}\\ + \\ \text{(Installed Nameplate Capacity of Wind Generators}\\ \text{Serving Load within WALC} \times \text{Wind Capacity Multiplier)}\end{array}}}$$

The numerator includes the annual costs associated with plant-in-service, operation and maintenance, purchase of regulation products, purchases of power to support WALC's ability to regulate, and other related costs involved in providing the service. The denominator consists of the load within WALC that requires this service plus the product of the installed nameplate capacity of solar and wind generators serving load within WALC and the applicable capacity multipliers.

Based on the formula rate, the charge will be calculated each fiscal year using updated financial and load data. The charge will be effective on October 1st of each year and will be posted on WALC's website.

Types of Assessments

There are two different applications of this formula rate:

1) A load-based assessment which is applicable to load within WALC (total metered load less Federal power allocation, including behind the meter generation rating, or if available, hourly data if generation is synchronized) and the installed nameplate capacity of all intermittent resources serving load within WALC.

2) A self-provision assessment which allows entities with Automatic Generation Control (AGC) to self-provide for all or a portion of their loads. Entities with AGC are known as Sub-Balancing Authorities (SBA) and must meet all of the following criteria: (a) have a well-defined boundary, with WALC-approved revenue-quality metering, accurate as defined by the North American Electric Reliability Corporation (NERC), to include Megawatt (MW) flow data availability at 6-second or smaller intervals; (b) have AGC responsive unit(s); (c) demonstrate Regulation Service capability; and (d) execute a contract with WALC, provide all requested data, and meet the SBA error criteria below.

Self-provision is measured by use of the entity's 1-minute average Area Control Error (ACE) to determine the amount of self-provision. The ACE is used to calculate the Regulation Service charges every hour as follows:

1) If the entity's 1-minute average ACE for the hour is less than or equal to 0.5 percent of its hourly average load, no charge is assessed for that hour.

2) If the entity's 1-minute average ACE for the hour is greater than or equal to 1.5 percent of the entity's hourly average load, WALC assess charges using the hourly load-based assessment applied to the entity's peak load for that month.

3) If the entity's 1-minute average ACE for the hour is greater than 0.5 percent but less than 1.5 percent of its hourly average load, WALC assesses charges based on linear interpolation of no charge and full charge, using the hourly load-based assessment applied to the entity's peak load for that month.

WALC monitors the entity's self-provision on a regular basis. If WALC determines that the entity has not been attempting to self-regulate, WALC will, upon notification, employ the load-based assessment methodology described above.

Alternative Arrangements

Exporting Intermittent Resource Requirement: An entity that exports the output from an intermittent generator to another BA Area will be required to dynamically meter or dynamically schedule that resource out of WALC to another BA unless arrangements, satisfactory to WALC, are made for that entity to acquire this service from a third-party or self-supply (as outlined below). An intermittent generator is one whose output is volatile and variable due to factors beyond direct operational control and, therefore, is not dispatchable.

Self- or Third-party Supply: WALC may allow an entity to supply some or all of its required regulation, or contract with a third party. This entity must have revenue quality metering at every load and generation point, with accuracy as defined by NERC, to include MW flow data availability at 6-second (or smaller) intervals. WALC will evaluate the entity's metering, telecommunications and regulating resource, as well as the required level of regulation, to determine whether the entity qualifies to self-supply under this provision. If approved, the entity is required to enter into a separate agreement with WALC which will specify the terms of self-supply.

Customer Accommodation

For entities unwilling to take Regulation Service, self-provide as described above, or obtain the service from a third party, WALC will assist the entity in dynamically metering its loads/resources to another BA. Until such time meter configuration is accomplished, the entity will be responsible for charges assessed under this schedule.

Rate Schedule DSW–EI4

SCHEDULE 4 to OATT

(Supersedes Schedule DSW–EI3)

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

Desert Southwest Region and Western Area Lower Colorado Balancing Authority

ENERGY IMBALANCE SERVICE

Effective

The first day of the first full billing period beginning on or after October 1, 2016, and will remain in effect through September 30, 2021, or until superseded.

Applicable

Energy Imbalance Service is provided when there is a difference between the scheduled and actual delivery of energy to a load located within a Balancing Authority Area (BA Area) over a single hour. The Transmission Service Provider (TSP) or the Balancing Authority (BA) who performs this function for the TSP must offer this service when transmission is used to serve load within its BA Area.

The Western Area Lower Colorado Balancing Authority (WALC) performs this function for the Federal TSP. Customers of a Federal TSP must purchase this service from WALC or make alternative comparable arrangements to satisfy their Energy Imbalance obligations. Non-Federal TSPs must have separate agreements with WALC that specify the terms of Energy Imbalance Service. WALC may charge a transmission customer for either energy imbalances under this schedule or generator imbalances under Schedule 9 for imbalances occurring during the same hour, but not both unless the imbalances aggravate rather than offset each other.

Formula Rate

Charges for energy imbalances are based on the deviation bands as follows:

1. For deviations within ±1.5 percent (with a minimum of 4 MW) of the metered load, the settlement for on-peak and off-peak hours is 100 percent.
2. For deviations greater than ±1.5 up to 7.5 percent (or greater than 4 MW up to 10 MW) of the metered load, the settlement for on-peak hours is 110 percent for under-delivery and 90 percent for over-delivery, and the settlement for off-peak hours is 110 percent for under-delivery and 75 percent for over-delivery.
3. For deviations greater than ±7.5 percent (or 10 MW) of the metered load, the settlement for on-peak hours is 125 percent for under-delivery and 75 percent for over-delivery, and the settlement for off-peak hours is 125 percent for under-delivery and 60 percent for over-delivery.

The deviation bands will be applied hourly and any energy imbalances that occur as a result of the transmission customer's scheduled transactions will be netted on a monthly basis and settled financially at the end of the month. For purposes of this schedule, the proxy prices used to determine financial settlement will be derived from the Palo Verde electricity price indexes, or similar alternative, for on-peak and off-peak. WALC may accept settlement in energy in lieu of financial settlement.

During periods of BA operating constraints, WALC reserves the right to eliminate credits for over-delivery. The cost to WALC of any penalty assessed by a regulatory authority due to a violation of operating standards resulting from under or over-delivery of energy may be passed through to customers.

Rate Schedule DSW–SPR4

SCHEDULE 5 to OATT

(Supersedes Schedule DSW–SPR3)

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

Desert Southwest Region and Western Area Lower Colorado Balancing Authority

OPERATING RESERVE—SPINNING RESERVE SERVICE

Effective

The first day of the first full billing period beginning on or after October 1, 2016, and will remain in effect through September 30, 2021, or until superseded.

Applicable

Spinning Reserve Service is needed to serve load immediately in the event of a system contingency and may be provided by generating units that are on-line and loaded at less than maximum output. The Transmission Service Provider (TSP) or the Balancing Authority (BA) who performs this function for the TSP must offer this service when transmission is used to serve load within its BA Area.

The Western Area Lower Colorado Balancing Authority (WALC) performs this function for the Federal TSP. Customers of a Federal TSP must purchase this service from WALC or make alternative arrangements to satisfy their Spinning Reserve obligations.

Formula Rate

Cost of Service = Market Price + Administrative Fee

WALC has no Spinning Reserves available for sale. Upon request, WALC will purchase at market price and pass-through the cost plus an administrative fee that covers the cost of procuring and supplying Spinning Reserves. The customer will be responsible for providing the transmission needed to deliver the Spinning Reserves purchased.

Rate Schedule DSW–SUR4

SCHEDULE 6 to OATT

(Supersedes Schedule DSW–SPR3

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

Desert Southwest Region and Western Area Lower Colorado Balancing Authority

OPERATING RESERVE—SUPPLEMENTAL RESERVE SERVICE

Effective

The first day of the first full billing period beginning on or after October 1, 2016, and will remain in effect through September 30, 2021, or until superseded.

Applicable

Supplemental Reserve Service is needed to serve load in the event of a system contingency. It is not available immediately to serve load but is generally available within a short period of time after a system contingency event. This service may be provided by generating units that are on-line but unloaded, by quick-start generation, or by interruptible load. The Transmission Service Provider (TSP) or the Balancing Authority (BA) who performs this function for the TSP must offer this service when transmission is used to serve load within its BA Area.

The Western Area Lower Colorado Balancing Authority (WALC) performs this function for the Federal TSP. Customers of a Federal TSP must purchase this service from WALC or make alternative arrangements to satisfy their Supplemental Reserve obligations.

Formula Rate

Cost of Service = Market Price + Administrative Fee

WALC has no Supplemental Reserves for sale. Upon request, WALC will purchase at market price and pass-through the cost plus an administrative fee that covers the cost of procuring and supplying Supplemental Reserves. The customer will be responsible for providing the transmission needed to deliver.

Rate Schedule DSW–GI2

SCHEDULE 9 to OATT

(Supersedes Schedule DSW–GI1)

UNITED STATES DEPARTMENT OF ENERGY

WESTERN AREA POWER ADMINISTRATION

Desert Southwest Region and Western Area Lower Colorado Balancing Authority

GENERATOR IMBALANCE SERVICE

Effective

The first day of the first full billing period beginning on or after October 1, 2016, and will remain in effect through September 30, 2021, or until superseded.

Applicable

Generator Imbalance Service is provided when a difference occurs between the output of a generator located in the Balancing Authority Area (BA Area) and the delivery schedule from that generator to another BA Area or a load within the Transmission Service Provider's (TSP) BA Area over a single hour. The TSP or the Balancing Authority (BA) who performs this function for the TSP must offer this service, to the extent it is physically feasible to do so from its resources or from resources available to it, when transmission is used to deliver energy from a generator located within its BA Area.

The Western Area Lower Colorado Balancing Authority (WALC) performs this function for the Federal TSP. Customers of a Federal TSP must purchase this service from WALC or make alternative comparable arrangements to satisfy their Generator Imbalance obligations. Non-Federal TSPs must have separate agreements with WALC that specify the terms of Generator Imbalance Service. An intermittent resource serving load outside WALC will be required to dynamically schedule or dynamically meter their generation to another BA Area unless arrangements, satisfactory to WALC, are made to acquire this service from a third-party. An intermittent resource, for the limited purpose of this schedule, is an electric generator that is not dispatchable and cannot store its fuel source, and therefore cannot respond to changes in demand or respond to transmission security constraints.

WALC may charge a transmission customer for either generator imbalances under this schedule or energy imbalances under Schedule 4 for imbalances occurring during the same hour, but not both unless the imbalances aggravate rather than offset each other.

Formula Rate

Charges for generator imbalances are based on the deviation bands as follows:

1. For deviations within ±1.5 percent (with a minimum of 4 MW) of the metered generation, the settlement for on-peak and off-peak hours is 100 percent.
2. For deviations greater than ±1.5 up to 7.5 percent (or greater than 4 MW up to 10 MW) of the metered generation, the settlement for on-peak hours is 110 percent for under-delivery and 90 percent for over-delivery, and the settlement for off-peak hours is 110 percent for under-delivery and 75 percent for over-delivery.
3. For deviations greater than ±7.5 percent (or 10 MW) of the metered generation, the settlement for on-peak hours is 125 percent for under-delivery and 75 percent for over-delivery, and the settlement for off-peak hours is 125 percent for under-delivery and 60 percent for over-delivery. An intermittent resource will be exempt from this deviation band but will be subject to the settlement provisions in the second deviation band for all deviations greater than ±7.5 percent (or 10 MW).

The deviation bands will be applied hourly and any generator imbalances that occur as a result of the transmission customer's scheduled transactions will be netted on a monthly basis and settled financially at the end of the month. For purposes of this schedule, the proxy prices used to determine financial settlement will be derived from the Palo Verde electricity price indexes, or similar alternative, for on-peak and off-peak. WALC may accept settlement in energy in lieu of financial settlement.

During periods of BA operating constraints, WALC reserves the right to eliminate credits for over-delivery. The cost to WALC of any penalty assessed by a regulatory authority due to a violation of operating standards resulting from under or over-delivery of energy may be passed through to customers.

[FR Doc. 2016–20397 Filed 8–24–16; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OLEM–2016–0465, FRL–9951–43–OLEM]

Agency Information Collection Activities; Proposed Collection; Comment Request; Information Requirements for Boilers and Industrial Furnaces

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit the information collection request (ICR), Information Requirements for Boilers and Industrial Furnaces (EPA ICR No. 1361.17, OMB Control No. 2050–0073) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*). Before doing so, the EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through December 31, 2016. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before October 24, 2016.

ADDRESSES: Submit your comments, referencing by Docket ID No. EPA–HQ–OLEM–2016–0465, online using *www.regulations.gov* (our preferred method), by email to *rcra-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Peggy Vyas, Office of Resource Conservation and Recovery (mail code 5303P), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: 703–308–5477; fax number: 703–308–8433; email address: *vyas.peggy@epa.gov.*

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the PRA, the EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, the EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

Abstract: EPA regulates the burning of hazardous waste in boilers, incinerators, and industrial furnaces (BIFs) under 40 CFR parts 63, 264, 265, 266 and 270. This ICR describes the paperwork requirements that apply to the owners and operators of BIFs. This includes the general facility requirements at 40 CFR parts 264 and 265, subparts B thru H; the requirements applicable to BIF units at 40 CFR part 266; and the RCRA Part B permit application and modification requirements at 40 CFR part 270.

Form Numbers: None.

Respondents/affected entities: Business or other for-profit.

Respondent's obligation to respond: Mandatory (per 40 CFR 264, 265, and 270).

Estimated number of respondents: 114.

Frequency of response: On occasion.

Total estimated burden: 291,757 hours per year. Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $21,004,550, which includes $9,839,942 annualized labor costs and $11,164,608 annualized capital or O&M costs.

Changes in Estimates: The burden hours are likely to stay substantially the same.

Dated: August 17, 2016.

Barnes Johnson,

Director, Office of Resource Conservation and Recovery.

[FR Doc. 2016–20321 Filed 8–24–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9951–35–OA]

Meeting of the Local Government Advisory Committee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Local Government Advisory Committee's (LGAC) Protecting America's Waters Workgroup is seeking input on the LGAC's Charge from the U.S. Environmental Protection Agency (EPA) to give advice and recommendations to the Administrator to inform the development of a National Action Plan for Drinking Water (Action Plan). The LGAC will provide their final recommendations to the EPA Administrator during the autumn of 2016.

EPA is committed to working with government partners, communities, and stakeholders to strengthen the nations drinking water systems. The LGAC Protecting America's Waters Workgroup will have a series of meetings to hear from local elected and appointed officials. These meetings will be held on Wednesday, September 7th, 2016 at 4:30–5:30 EDT; and Wednesday, September 21st, 4:30–5:30 EDT via teleconference. The focus of the workgroup meeting is to hear from local officials on issues of concern related to LGAC's Charge (included below).

The Workgroup will consider the following:

- *Advancing Next Generation Safe Drinking Water Act Implementation:* Identify key opportunities for federal, state, tribal and local government to work together to implementation of Safe Drinking Water Act regulations and programs, including ways to increase communication and public awareness and accountability.
- *Addressing Environmental Justice and Equity in Infrastructure Funding:* Identify ways in which federal, state, tribal and local governments, and utilities can work together to ensure that drinking water infrastructure challenges of low-income environmental justice communities and small systems are being appropriately prioritized and addressed, including through increased information, sharing and replicating best practices, and building community capacity.
- *Strengthening Protections against Lead in Drinking Water:* Identify opportunities to coordinate and collaborate on implementing the current Lead and Copper Rule, particularly in environmental justice communities and expand and strengthen opportunities for stakeholder engagement to support the development of a revised rule.
- *Emerging and Unregulated Contaminant Strategies:* Develop and implement improved approaches through which EPA, state, tribal and local governments, utilities and other stakeholders can work together to prioritize and address the challenges posed by emerging and unregulated contaminants such as algal toxins and perfluorinated compounds (PFCs) and increasing public awareness, especially in vulnerable populations.
- The Workgroup is also interested in information on how public and private sector partnerships have advanced economic solutions; where source water protection saved taxpayers' dollars; and where communities have created jobs and produced public savings by ensuring clean and healthy water infrastructure.

This is an open meeting and state, local and tribal officials are invited to participate. The Workgroup will hear comments from state, local and tribal officials and the public between 4:45 p.m.–5:15 p.m. on Wednesday, September 7, 2016 and Wednesday, September 21, 2016. Individuals or organizations wishing to address the workgroup will be allowed a maximum of five minutes to present their point of view. Also, written comments are encouraged and may be submitted electronically to *Eargle.Frances@epa.gov.*

Please contact the Designated Federal Officer (DFO) at the number listed below to schedule comment time. Time will be allotted on a first-come first-serve basis. If you are interested in participating in this or subsequent meetings of the workgroup, details will be posted when they are available at: *https://www.epa.gov/ocir/local-government-advisory-committee-lgac.* Comments submitted to the workgroup are solely for the Workgroup's consideration.

ADDRESSES: The LGAC Protecting America's Waters Workgroup meeting will be held via teleconference. The Workgroup's meeting summary will be available after the meeting online at: *https://www.epa.gov/ocir/local-government-advisory-committee-lgac* and can be obtained by written request to the DFO.

FOR FURTHER INFORMATION CONTACT: Frances Eargle, the Designated Federal Officer for the Local Government Advisory Committee (LGAC) at (202) 564-3115 or email at *Eargle.frances@epa.gov.*

Information on Services for Those With Disabilities: For information on access or services for individuals with disabilities, please contact Frances Eargle at (202) 564–3115 or *eargle.frances@epa.gov.* To request accommodation of a disability, please request 2 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: August 19, 2016.

Jack Bowles,

Director, State and Local, Office of Congressional and Intergovernmental Relations.

[FR Doc. 2016–20408 Filed 8–24–16; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within twelve days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 011117–056.

Title: United States/Australasia Discussion Agreement.

Parties: ANL Singapore Pte Ltd.; CMA–CGM.; Hamburg-Süd; Mediterranean Shipping Company S.A.; and Pacific International Lines (PTE) LTD.

Filing Party: Wayne R. Rohde, Esq.; Cozen O'Connor; 1200 Nineteenth Street NW.; Washington, DC 20036.

Synopsis: The amendment revises Appendix A to remove the names of the former parties that previously resigned from the Agreement and revises Appendix B to adjust minimum levels of service in light of those resignations.

Agreement No.: 012329–002.

Title: COSCON/HSD Slot Charter Agreement, Asia-U.S. East Coast.

Parties: Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft KG; COSCO Container Lines Company, Limited (COSCON).

Filing Party: Eric Jeffrey, Esq.; Nixon Peabody LLP; 799 9th St. NW., Suite 500; Washington, DC 20001.

Synopsis: The amendment implements the transition from CSCL to COSCON, reduces the scope of authority from a slot exchange to a slot charter from COSCON to HSD, and adds Vietnam to the geographic scope.

By Order of the Federal Maritime Commission.

Dated: August 19, 2016.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2016–20318 Filed 8–24–16; 8:45 am]

BILLING CODE 6731–AA–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–16–0997]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The notice for the proposed information collection is published to obtain comments from the public and affected agencies.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address any of the following: (a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) Enhance the quality, utility, and clarity of the information to be collected; (d) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses; and (e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570 or send an email to *omb@cdc.gov.* Written comments and/or suggestions regarding the items contained in this notice should be directed to the Attention: CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Standardized National Hypothesis Generating Questionnaire (OMB Control No. 0920–0997, expires 10/31/2016)—Revision—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

It is estimated that each year roughly 1 in 6 Americans gets sick, 128,000 are hospitalized, and 3,000 die of foodborne diseases. CDC and partners ensure rapid and coordinated surveillance, detection, and response to multistate outbreaks, to limit the number of illnesses, and to learn how to prevent similar outbreaks from happening in the future.

Conducting interviews during the initial hypothesis-generating phase of multistate foodborne disease outbreaks presents numerous challenges. In the U.S. there is not a standard, national form or data collection system for illnesses caused by many enteric pathogens. Data elements for hypothesis generation must be developed and agreed upon for each investigation. This process can take several days to weeks and may cause interviews to occur long after a person becomes ill.

Using the Standardized National Hypothesis-Generating Questionnaire (SNHGQ), CDC requests OMB approval to collect standardized information from individuals who have become ill during a multistate foodborne disease event. Since the questionnaire is designed to be administered by public health officials as part of multistate hypothesis-generating interview activities, this questionnaire is not expected to entail significant burden to respondents.

The Standardized National Hypothesis-Generating Core Elements Project was established with the goal to define a core set of data elements to be used for hypothesis generation during multistate foodborne investigations. These elements represent the minimum set of information that should be available for all outbreak-associated cases identified during hypothesis generation. The core elements would ensure that similar exposures would be ascertained across many jurisdictions, allowing for rapid pooling of data to improve the timeliness of hypothesis-generating analyses and shorten the time to pinpoint how and where contamination events occur.

The SNHGQ was designed as a data collection tool for the core elements, to be used when a multistate cluster of enteric disease infections is identified. The questionnaire is designed to be administered over the phone by public health officials to collect core elements data from case-patients or their proxies. Both the content of the questionnaire (the core elements) and the format were developed through a series of working groups comprised of local, state, and federal public health partners.

Many of the updates to the SNHGQ were made to better align with the questions from other existing questionnaires. Changes include: Exposure sections rearranged to improve interview flow, addition of antibiotic exposures and descriptive clinical questions, aligning demographic questions to conform with other OMB-approved questionnaires, addition of new exposure questions of interest, deletion of exposure questions that do not need to be assessed, and re-wording of existing questions to better align with other OMB-approved questionnaires and to improve question comprehension.

The total estimated annualized burden for the Standardized National Generating Questionnaire is 3,000 hours (approximately 4,000 individuals identified during the hypothesis-generating phase of outbreak investigations × 45 minutes/response). There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Individuals	Standardized National Hypothesis Generating Questionnaire (Core Elements).	4,000	1	45/60

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–20333 Filed 8–24–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day-16-0852]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The notice for the proposed information collection is published to obtain comments from the public and affected agencies.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address any of the following: (a) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) Enhance the quality, utility, and clarity of the information to be collected; (d) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses; and (e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570 or send an email to *omb@cdc.gov.* Written comments and/or suggestions regarding the items contained in this notice should be directed to the Attention: CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Prevalence Survey of Healthcare-Associated Infections (HAIs) and Antimicrobial Use in U.S. Acute Care Hospitals (OMB Control No. 0920–0852, Expires 12/31/2016)—Revision—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Preventing healthcare-associated infections (HAIs) and reducing the emergence and spread of antimicrobial resistance are priorities for the CDC and the U.S. Department of Health and Human Services (DHHS). Improving antimicrobial drug prescribing in the United States is a critical component of strategies to reduce antimicrobial resistance, and is a key component of the President's National Strategy for Combating Antibiotic Resistant Bacteria (CARB), which calls for "inappropriate inpatient antibiotic use for monitored conditions/agents" to be "reduced 20% from 2014 levels" (page 9, *https://www.whitehouse.gov/sites/default/files/docs/carb_national_strategy.pdf*). To achieve these goals and improve patient safety in the United States, it is necessary to know the current burden of infections and antimicrobial drug use in different healthcare settings, including the types of infections and drugs used in short-term acute care hospitals, the pathogens causing infections, and the quality of antimicrobial drug prescribing.

Today more than 5,000 short-term acute care hospitals participate in national HAI surveillance through the CDC's National Healthcare Safety Network (NHSN, OMB Control No. 0920–0666, expiration 12/31/18). These hospitals' surveillance efforts are focused on those HAIs that are required to be reported as part of state legislative mandates or Centers for Medicare & Medicaid Services (CMS) Inpatient Quality Reporting (IQR) Program. Hospitals do not report data on all types of HAIs occurring hospital-wide. Data from a previous prevalence survey showed that approximately 28% of all HAIs are included in the CMS IQR Program. Periodic assessments of the magnitude and types of HAIs occurring in all patient populations in hospitals are needed to inform decisions by local and national policy makers and by hospital infection prevention professionals regarding appropriate targets and strategies for HAI prevention.

The CDC's hospital prevalence survey efforts began in 2008–2009. A pilot survey was conducted over a 1-day period at each of nine acute care hospitals in one U.S. city. This pilot phase was followed in 2010 by a phase 2, limited roll-out HAI and antimicrobial use prevalence survey, conducted in 22 hospitals across 10 Emerging Infections Program sites (California, Colorado, Connecticut, Georgia, Maryland, Minnesota, New Mexico, New York, Oregon, and Tennessee). A full-scale, phase 3 survey was conducted in 2011, involving 183 hospitals in the 10 EIP sites. Data from this survey conducted in 2011 showed that there were an estimated 722,000 HAIs in U.S acute care hospitals in 2011, and about half of the 11,282 patients included in the survey in 2011 were receiving antimicrobial drugs. The survey was repeated in 2015–2016 to update the national HAI and antimicrobial drug use burden; data from this survey will also provide baseline information on the quality of antimicrobial drug prescribing for selected, common clinical conditions in hospitals. Data collection is ongoing at this time.

A revision of the prevalence survey's existing OMB approval is sought to reduce the data collection burden and to extend the approval to allow another short-term acute care hospital survey to be conducted in 2019. Data from the 2019 survey will be used to evaluate progress in eliminating HAIs and improving antimicrobial drug use.

The 2019 survey will be performed in a sample of up to 300 acute care hospitals, drawn from the acute care hospital populations in each of the 10 EIP sites (and including participation from many hospitals that participated in prior phases of the survey). Infection prevention personnel in participating hospitals and EIP site personnel will collect demographic and clinical data from the medical records of a sample of eligible patients in their hospitals on a single day in 2019, to identify CDC-defined HAIs and collect information on antimicrobial drug use. The survey data will be used to estimate the prevalence of HAIs and antimicrobial drug use and describe the distribution of infection types and pathogens. The data will also be used to determine the quality of antimicrobial drug prescribing. These data will inform strategies to reduce and eliminate healthcare-associated infections—a DHHS Healthy People 2020 objective (*http://www.healthypeople.gov/2020/topicsobjectives2020/overview.aspx?topicid=17*). This survey project also supports the CDC Winnable Battle goal of improving national surveillance for healthcare-associated infections (*http://www.cdc.gov/winnablebattles/Goals.html*) and the CARB National Strategy (*https://www.whitehouse.gov/sites/default/files/docs/carb_national_strategy.pdf*) and Action Plan (*https://www.whitehouse.gov/sites/default/files/docs/national_action_plan_for_combating_antibotic-resistant_bacteria.pdf*).

There are no costs to the respondents other than their time. The total estimated annual burden hours is 1,860. This represents a reduction in the total estimated annual burden hours from the previous approval due to a reduction in the number of respondents.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form Name	Number of respondents	Number of responses per respondent	Average burden per response (in hrs.)
Infection Preventionist	Healthcare Facility Assessment (HFA)	100	1	45/60
Infection Preventionist	Patient Information Form (PIF)	100	63	17/60

Leroy A. Richardson,

Chief, Information Collection Review Office, Office of Scientific Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2016–20366 Filed 8–24–16; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Statement of Organization, Functions, and Delegations of Authority

AGENCY: Administration for Children and Families, HHS.

ACTION: Notice.

SUMMARY: Statement of Organization, Functions, and Delegations of Authority.

The Administration for Children and Families (ACF) has realigned the Office of Community Services (OCS). This notice announces the realignment of OCS functions to rename the Division of State Assistance to the Division of Community Assistance and establishes the Division of Social Services. It also consolidates the Division of Community Discretionary Programs and the Division of Community Demonstration Programs to establish the Division of Community Discretionary and Demonstration Programs.

FOR FURTHER INFORMATION CONTACT: Jeannie Chaffin, Director, Office of Community Services, 330 C Street SW., Washington, DC 20201, (202) 401–9333.

This notice amends Part K of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (DHHS), Administration for Children and Families (ACF), as follows: Office of Community Services (OCS), as last amended by 767 FR 67198, November 4, 2002, the changes are as follows:

I. Under Chapter KG, Office of Community Services, delete KG in its entirety and replace with the following:

KG.00 Mission. The Office of Community Services (OCS) advises the Secretary, through the Assistant Secretary for Children and Families, on matters relating to community programs to promote economic self-sufficiency. OCS is responsible for administering programs that serve low-income and needy individuals and address the overall goal of economic security for individuals and families with low incomes and community improvement for distressed neighborhoods. OCS administers the Community Services Block Grant, Social Services Block Grant, and the Low Income Home Energy Assistance Block Grant programs. OCS also administers a variety of discretionary grant programs that foster family stability, economic security, responsibility and self-support, promote and provide services to homeless and individuals with low-income and develop new and innovative approaches to reduce the need for public assistance.

KG.10 Organization. The Office of Community Services is headed by a Director who reports directly to the Assistant Secretary for Children and Families. The office is organized as follows:

Office of the Director (KGA)
Division of Community Assistance (KGB)
Division of Energy Assistance (KGE)
Division of Community Discretionary and Demonstration Programs (KGG)
Division of Social Services (KGH)

KG.20 Functions. A. Office of the Director provides executive direction and leadership to the Office of Community Services (OCS) and coordinates all elements of the Office. The Deputy Director assists the Director in carrying out the responsibilities of the Office. Within the Office, the administrative staff assists the Director in managing the formulation and execution of program and salaries and expenses budgets, and in providing administrative, personnel and data processing support services.

B. Division of Energy Assistance administers the Low Income Home Energy Assistance program (LIHEAP) at the federal level. It develops guidelines, policies and regulations to provide direction to states, territories, Indian tribes and tribal organizations in administering LIHEAP. The Division of LIHEAP calculates state allotments and develops statistical information regarding state plan characteristics, energy consumption, state median income estimates, fuel costs, and housing and demographic characteristics. It prepares, analyzes and recommends specific proposals for new legislation; prepares reports as required by Congress; and identifies and develops research and evaluation priorities and assesses the impact of research and evaluation findings and statistical data in terms of program directions.

The Division of LIHEAP provides leadership in interpretation and application of federal program policy as it relates to compliance activities. The Division of LIHEAP reviews grantee applications and amendments; provides the Office of Administration, Division of Mandatory Grants with information necessary to issue grants; and investigates complaints. It provides assistance to states, tribes and territories in developing energy program policies and operational procedures; evaluates compliance of state and tribal policies and operations with statutory and regulatory requirements; and provides support in developing and implementing program improvements. The Division of LIHEAP assists states and other public and private organizations by providing training and technical assistance in areas related to home energy consumption.

C. Division of Community Assistance administers the Community Services Block Grant (CSBG). It is responsible for developing, updating and implementing regulations and policies for this program. It provides guidance, review, support and assistance to states and grantees on HHS policies, regulations, procedures and systems necessary to assure efficient program operation at the state, territorial and tribal levels.

The Division of CSBG is responsible for assessing compliance with the provisions reviewing and resolving formal complaints, reviewing and recommending approval or disapproval of waiver requests, and evaluating activities in the programs, as appropriate.

D. Division of Community Discretionary and Demonstration Programs administers a variety of discretionary grant programs that foster family stability, economic security, responsibility and self-support, and promote and provide services to low-income individuals. These programs are administered either through grants, contracts or jointly financed cooperative arrangements. Assistance may be provided to states, public and private non-profit organizations and community agencies to provide technical assistance, training and on-going services and activities of national, regional or state-wide significance. Assistance may also be provided to private, locally-initiated, non-profit community development corporations (or affiliates of such corporations). This assistance may be provided to address a variety of areas of interest, such as rural housing and community facilities, assistance to migrants and seasonal farm workers, recreational and educational activities for low-income youth, community food and nutrition, support programs for homeless individuals, job creation, and business development opportunities. The Division also administers continued-use-of-assets agreements between OCS and Community Development Corporations (CDCs).

This division also administers demonstration programs that develop new and innovative approaches to deal with the critical needs of the poor which are common to many communities, reduce welfare dependency, and create business and employment opportunities. These programs, including the Assets for Independence (AFI) program, are administered either through grants, contracts or jointly financed cooperative arrangements. In coordination with the Office of Planning, Research and Evaluation (OPRE), the Division oversees and monitors demonstration programs; evaluates projects for their effectiveness in order to replicate those which are most successful; and prepares reports on significant findings.

E. Division of Social Services administers the Social Services Block Grant (SSBG). It is responsible for developing, updating and implementing regulations and policies for this program. It provides guidance, review, support and assistance to states and grantees on HHS policies, regulations, procedures and systems necessary to assure efficient program operation at the state, territorial and tribal levels. The Division of Social Services is responsible for administering emergency supplemental disaster funding assessing compliance with the provisions of the SSBG program, reviewing and resolving formal complaints, reviewing and recommending approval or disapproval of waiver requests, and evaluating activities in the programs, as appropriate.

II. *Continuation of Policy.* Except as inconsistent with this reorganization, all statements of policy and interpretations with respect to organizational components affected by this notice within ACF, heretofore issued and in effect on this date of this reorganization are continued in full force and effect.

III. *Delegation of Authority.* All delegations and re-delegations of authority made to officials and employees of affected organizational components will continue in them or their successors pending further re-delegations, provided they are consistent with this reorganization.

IV. *Funds, Personnel, and Equipment.* Transfer of organizations and functions affected by this reorganization shall be accompanied in each instance by direct and support funds, positions, personnel, records, equipment, supplies, and other resources.

This reorganization will be effective upon date of signature.

Dated: August 19, 2016.

Mark H. Greenberg,

Acting Assistant Secretary for Children and Families.

[FR Doc. 2016–20400 Filed 8–24–16; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

TITLE: Assessing the Implementation and Cost of High Quality Early Care and Education: Comparative Multi-Case Study.

OMB NO.: New.

DESCRIPTION: The Administration for Children and Families (ACF) at the U.S. Department of Health and Human Services (HHS) seeks approval to collect new information to use in developing measures of the implementation and costs of high quality early care and education. This information collection is part of the project, Assessing the Implementation and Cost of High Quality Early Care and Education (ECE–ICHQ). The project's goal is to create a technically sound and feasible instrument that will provide consistent, systematic measures of the implementation and costs of education and care in center-based settings that serve children from birth to age 5. The resulting measures will inform research, policy, and practice by improving understanding of variations in what centers do to support quality, their associated costs, and how resources for ECE may be better aligned with expectations for quality.

The goals of the study are (1) to test and refine a mixed methods approach to identifying the implementation activities and costs of key functions within ECE centers and (2) to produce data for creating measures of implementation and costs. The study is currently collecting data through on-site visits to 24 centers as part of an initial phase of data collection under clearance, #0970–0355. This initial phase is meant to test data collection tools and methods, conduct cognitive interviewing to obtain feedback from respondents about the tools, and reduce and refine the tools for the next phase of data collection.

This request is focused on the next phase of data collection which will include 72 ECE centers in three states. The next phase will rely on remote data collection through electronic data collection tools, telephone interviews, and web-based surveys.

RESPONDENTS: ECE site administrators or center directors, program directors, education specialists, financial managers or accountants, teachers, and aides.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Center recruitment call screener (to confirm selection criteria and gain participation; assumes outreach to 5 centers for every 1 center needed)	360	1	.33	119
Center engagement call script (to gather basic characteristics and plan steps for participation)	72	1	.75	54
Implementation interview protocol	72	1	8	576
Electronic cost workbook	72	1	6	432
Cost interview protocol	72	1	2	144
Web-based time-use survey	579	1	.5	290

Estimated Total Annual Burden Hours: 1,615 hours.

ADDITIONAL INFORMATION: In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 330 C Street SW., 4th Floor, Washington, DC 20201, Attn: OPRE Reports Clearance Officer. Email address: *OPREinfocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Robert Sargis,

ACF Reports Clearance Officer.

[FR Doc. 2016–20386 Filed 8–24–16; 8:45 am]

BILLING CODE 4184–23–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–D–1292]

Abbreviated New Drug Application Submissions—Refuse To Receive for Lack of Justification of Impurity Limits; Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a guidance for industry entitled "Abbreviated New Drug Application Submissions—Refuse to Receive for Lack of Justification of Impurity Limits." This guidance is intended to assist applicants preparing to submit to FDA abbreviated new drug applications (ANDAs) and prior approval supplements for which the applicant is seeking approval of a new strength of the drug product. The guidance highlights deficiencies about impurity information that may cause FDA to refuse to receive (RTR) an ANDA.

DATES: Submit either electronic or written comments on Agency guidances at any time.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA–2014–D–1292 for "Abbreviated New Drug Application Submissions—Refuse to Receive for Lack of Justification of Impurity Limits." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of this guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Elizabeth Giaquinto Friedman, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 1670, Silver Spring, MD 20993–0002, 240–402–7930.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a guidance for industry entitled "Abbreviated New Drug Application Submissions—Refuse to Receive for Lack of Justification of Impurity Limits." This guidance is intended to assist applicants preparing to submit to FDA ANDAs and prior approval supplements to ANDAs for which the applicant is seeking approval of a new strength of the drug product. The guidance highlights serious deficiencies in impurity information that may cause FDA to RTR an ANDA. Specifically, these deficiencies include: (1) Failing to provide justification for proposed limits for specified identified impurities in drug substances and drug products that are above qualification thresholds; (2) failing to provide justification for specified unidentified impurities that are above identification thresholds; and (3) proposing limits for unspecified impurities (*e.g.,* any unknown impurity) that are above identification thresholds.

FDA evaluates each submitted ANDA individually to determine whether it is sufficiently complete to permit a substantive review and thus can be received by FDA. The Agency cannot receive an ANDA unless it contains the information required under section 505(j) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355(j)) and related regulations (*e.g.,* 21 CFR 314.101(b)(1)). FDA issued the guidance for industry "Abbreviated New Drug Application Submissions—Refuse-to-Receive Standards" to explain in some detail the kind of omissions that can lead to a RTR determination. A draft of this guidance was published on September 17, 2014, with the title "ANDA Submissions—Refuse to Receive for Lack of Proper Justification of Impurity Limits." Upon review of the comments submitted to the draft guidance, FDA removed the word "proper" from the title to emphasize that this guidance does not apply to the technical review of impurity limit justifications submitted in an ANDA.

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on "Abbreviated New Drug Application Submissions—Refuse to Receive for Lack of Justification of Impurity Limits." It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov.*

Dated: August 22, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–20399 Filed 8–24–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–1147]

Agency Information Collection Activities; Proposed Collection; Comment Request; Preparing a Claim of Categorical Exclusion or an Environmental Assessment for Submission to the Center for Food Safety and Applied Nutrition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection provisions of our guidance document entitled "Preparing a Claim of Categorical Exclusion or an Environmental Assessment for Submission to the Center for Food Safety and Applied Nutrition."

DATES: Submit either electronic or written comments on the collection of information by October 24, 2016.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA–2013–N–1147 for "Agency Information Collection Activities; Proposed Collection; Comment Request; Preparing a Claim of Categorical Exclusion or an Environmental Assessment for Submission to the Center for Food Safety and Applied Nutrition." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: FDA PRA Staff, Office of Operations, Food and Drug Administration, Three White Flint North, 10A63, 11601 Landsdown St., North Bethesda, MD 20852, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Preparing a Claim of Categorical Exclusion or an Environmental Assessment for Submission to the Center for Food Safety and Applied Nutrition—OMB Control Number 0910–0541—Extension

As an integral part of its decision making process, we are obligated under the National Environmental Policy Act of 1969 (NEPA) to consider the environmental impact of our actions, including allowing notifications for food contact substances to become effective and approving food additive petitions, color additive petitions, GRAS affirmation petitions, requests for exemption from regulation as a food additive, and actions on certain food labeling citizen petitions, nutrient content claims petitions, and health claims petitions. In 1997, we amended our regulations in part 25 (21 CFR part 25) to provide for categorical exclusions for additional classes of actions that do not individually or cumulatively have a significant effect on the human environment (62 FR 40570, July 29, 1997). As a result of that rulemaking, we no longer routinely require submission of information about the manufacturing and production of our regulated articles. We also have eliminated the previously required Environmental Assessment (EA) and abbreviated EA formats from the amended regulations. Instead, we have provided guidance that contains sample formats to help industry submit a claim of categorical exclusion or an EA to the Center for Food Safety and Applied Nutrition (CFSAN). The guidance document entitled "Preparing a Claim of Categorical Exclusion or an Environmental Assessment for Submission to the Center for Food Safety and Applied Nutrition" identifies, interprets, and clarifies existing requirements imposed by statute and regulation, consistent with the Council on Environmental Quality regulations (40 CFR 1507.3). It consists of recommendations that do not themselves create requirements; rather, they are explanatory guidance for our own procedures in order to ensure full compliance with the purposes and provisions of NEPA.

The guidance provides information to assist in the preparation of claims of categorical exclusion and EAs for submission to CFSAN. The following questions are covered in this guidance: (1) What types of industry-initiated actions are subject to a claim of categorical exclusion? (2) What must a claim of categorical exclusion include by regulation? (3) What is an EA? (4) When is an EA required by regulation and what format should be used? (5) What are extraordinary circumstances? and (6) What suggestions does CFSAN have for preparing an EA? Although CFSAN encourages industry to use the EA formats described in the guidance because standardized documentation submitted by industry increases the efficiency of the review process, alternative approaches may be used if these approaches satisfy the requirements of the applicable statutes and regulations. We are requesting the extension of OMB approval for the information collection provisions in the guidance.

Description of Respondents: The likely respondents include businesses engaged in the manufacture or sale of food, food ingredients, and substances used in materials that come into contact with food.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
25.15 (a) & (d) (to cover CE's under 25.32(i))	47	1	47	8	376
25.15 (a) & (d) (to cover CE's under 25.32(o))	1	1	1	8	8
25.15 (a) & (d) (to cover CE's under 25.32(q))	3	1	3	8	24
25.40 (a) & (c) EA's	57	1	57	180	10,260
Total					10,668

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

The estimates for respondents and numbers of responses are based on the annualized numbers of petitions and notifications qualifying for categorical exclusions listed under § 25.32(i) and (q) that the Agency has received in the past 3 years. Please note that, in the past 3 years, there have been no submissions that requested an action that would have been subject to the categorical exclusion in § 25.32(o). To avoid counting this burden as zero, we have estimated the burden for this categorical exclusion at one respondent making one submission a year for a total of one annual submission. The burden for submitting a categorical exclusion is captured under § 25.15(a) and (c).

To calculate the estimate for the hours per response values, we assumed that the information requested in this guidance for each of these three categorical exclusions is readily available to the submitter. For the information requested for the exclusion in § 25.32(i), we expect that submitter will need to gather information from appropriate persons in the submitter's company and to prepare this information for attachment to the claim for categorical exclusion. We believe that this effort should take no longer than 8 hours per submission. For the information requested for the categorical exclusions in § 25.32(o) and (q), the submitters will almost always merely need to copy existing documentation and attach it to the claim for categorical exclusion. We believe that collecting this information should also take no longer than 8 hours per submission.

For the information requested for the environmental assessments in § 25.40(a) and (c), we believe that submitters will submit an average of 57 environmental assessments annually. We estimate that each submitter will prepare an EA within 3 weeks (120 hours) and revise the EA based on Agency comments (between 40 to 60 hours), for a total preparation time of 180 hours. The burden relating to this collection has been previously approved under OMB control number 0910–0322, "Environmental Impact Consideration—21 CFR part 25". Upon approval of this collection of information by OMB, FDA will revise OMB control number 0910–0322 to remove the annual reporting burden for categorical exclusions and environmental assessment requests related to food additive petitions, color additive petitions, requests from exemption from regulation as a food additive, and submission of a food contact notification for a food contact substance. The future burden for categorical exclusion or environmental assessments for these requests will be captured under OMB control number 0910–0541, this collection of information.

Dated: August 19, 2016.

Jeremy Sharp,

Deputy Commissioner for Policy, Planning, Legislation, and Analysis.

[FR Doc. 2016–20369 Filed 8–24–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–D–1229]

Current Good Manufacturing Practice Requirements for Food for Animals; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry #235 entitled "Current Good Manufacturing Practice Requirements for Food for Animals." This draft guidance helps domestic and foreign facilities that are required to register as food facilities under the Federal Food, Drug, and Cosmetic Act (FD&C Act) determine whether and how they need to comply with the current good manufacturing practice requirements of the Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Food for Animals final rule.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by November 23, 2016.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA–2016–D–1229 for "Current Good Manufacturing Practice Requirements for Food for Animals." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the draft guidance to the Policy and Regulations Staff (HFV–6), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Jeanette Murphy, Center for Veterinary Medicine (HFV–200), Food and Drug Administration, 7519 Standish Place, Rockville, MD 20855, 240–402–6246, *jenny.murphy@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry #235 entitled "Current Good Manufacturing Practice Requirements for Food for Animals." This draft guidance is intended for domestic and foreign facilities that are required to register as food facilities under the FD&C Act because they manufacture, process, pack, or hold animal food for consumption in the United States.

This draft guidance contains information to help these facilities determine whether they need to comply with the current good manufacturing practice (CGMP) requirements for animal food established in the Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Food for Animals final rule published on September 17, 2015. (80 FR 56170). The CGMP requirements are codified in 21 CFR part 507, subpart B, and related requirements are codified in 21 CFR part 507, subpart A. The draft guidance additionally provides recommendations for compliance with the CGMP requirements for animal food, training, and recordkeeping.

II. Significance of Guidance

This level 1 draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on CGMP requirements for food for animals. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

III. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 507 have been approved under OMB control number 0910–0789.

IV. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/default.htm* or *http://www.regulations.gov.*

Dated: August 19, 2016.

Jeremy Sharp,

Deputy Commissioner for Policy, Planning, Legislation, and Analysis.

[FR Doc. 2016–20300 Filed 8–24–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–D–1220]

Human Food By-Products for Use as Animal Food; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft guidance for industry (GIF) #239 entitled "Human Food By-Products For Use As Animal Food." This draft guidance helps domestic and foreign facilities that are required to register as food facilities under the Federal Food, Drug, and Cosmetic Act (the FD&C Act), because they manufacture, process, pack, or hold human food for consumption in the United States, determine what requirements to follow for their human food by-products for use as animal food and provides examples and recommendations for how to meet those requirements.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by November 23, 2016.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

Instructions: All submissions received must include the Docket No. FDA–2016–D–1220 for "Human Food By-Products for Use as Animal Food; Draft Guidance for Industry." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the draft guidance to the Policy and Regulations Staff (HFV–6), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Jeanette Murphy, Center for Veterinary Medicine (HFV–200), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–402–6246, *jenny.murphy@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft GIF #239 entitled "Human Food By-Products for Use as Animal Food." This draft guidance is intended for domestic and foreign facilities that are required to register as food facilities under the FD&C Act because they manufacture, process, pack, or hold human food for consumption in the United States, which results in by-products for use as animal food.

This draft guidance contains information for these facilities to determine what requirements to follow for their human food by-products for use as animal food and provides examples and recommendations for how they might meet those requirements. The requirements were established in the Current Good Manufacturing Practice, Hazard Analysis, and Risk-Based Preventive Controls for Food for Animals final rule published on September 17, 2015 (80 FR 56170). The requirements are codified in 21 CFR parts 117 and 507.

II. Significance of Guidance

This level 1 draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on human food byproducts for use as animal food. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

III. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 507 have been approved under OMB control number 0910–0789.

IV. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/default.htm* or *http://www.regulations.gov.*

Dated: August 19, 2016.

Jeremy Sharp,

Deputy Commissioner for Policy, Planning, Legislation, and Analysis.

[FR Doc. 2016–20302 Filed 8–24–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; 30-Day Comment Request Study To Estimate Radiation Doses and Cancer Risks From Radioactive Fallout From the Trinity Nuclear Test—National Cancer Institute (NCI)

AGENCY: National Institutes of Health, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the National Cancer Institute, the National Institutes of Health, has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below. This proposed information collection was previously published in the **Federal Register** on May 13, 2016, p 29875 and allowed 60-days for public comment. One public comment was received. The purpose of this notice is to allow an additional 30 days for public comment.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 30-days of the date of this publication

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974, Attention: Desk Officer for NIH.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Steven L. Simon, Dosimetry Unit Head and Staff Scientist, Radiation Epidemiology Branch, Division of Cancer Epidemiology & Genetics, National cancer Institute, NIH, 9609 Medical Center Drive, MSC9778, Bethesda, MD 20892–9778 or call non-toll-free number (240)-276–7371 or email your request, including your address to: *ssimon@mail.nih.gov.*

SUPPLEMENTARY INFORMATION: The National Cancer Institute, NCI, National Institutes of Health, may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

In compliance with section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) has submitted to the Office of management and Budget (OMB) a request for review and approval of the information collection listed below.

Proposed Collection: Study to Estimate Radiation Doses and Cancer Risks from Radioactive Fallout from the Trinity Nuclear Test, 0925–NEW, National Cancer Institute (NCI), National Institutes of Health (NIH).

Need and Use of Information Collection: This Information Collection Request is for a radiation-related cancer risk projection study for the residents of the state of New Mexico (NM) potentially exposed to radioactive fallout from the Trinity nuclear test conducted in 1945. Data will be collected on diet and lifestyle from three groups in NM (non-Hispanic white, Hispanic, and Native American) alive in the 1940s via focus groups and key informant interviews. These data will be used to derive means and ranges of exposure-related parameters. Little information is currently available about dietary patterns among Native American community members or Hispanics in New Mexico in the 1940s. Exposure-related parameter values will be used with historical fallout deposition data in fallout dose assessment models to estimate external and internal radiation doses to representative persons in all counties in New Mexico by ethnicity and age. The estimated doses will be used with literature-derived risk and parameter values on risk/unit dose to project the excess cancers expected (per 1,000 persons within each stratum) including uncertainty on each estimate. Endpoints are leukemia, thyroid cancer, stomach cancer, colon cancer, and all solid cancers combined.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 536.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Instrument	Number of respondents	Frequency of response	Average time per response (in hours)	Annual burden hours
Individuals	Screener	315	1	10/60	53
	Consent Form	210	1	10/60	35
	Focus Groups	168	1	120/60	336
	Pre-Focus Group Guide	168	1	10/60	28
	Key Informant and Academic Interview.	42	1	120/60	84
Totals		210	525		536

Dated: August 19, 2016.

Karla Bailey,

Project Clearance Liaison, National Cancer Institute, NIH.

[FR Doc. 2016–20344 Filed 8–24–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Board of Scientific Counselors, NIA.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the NATIONAL INSTITUTE ON AGING, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, NIA.

Date: October 11–13, 2016.

Closed: October 11, 2016, 8:00 a.m. to 8:20 a.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Open: October 11, 2016, 8:20 a.m. to 11:50 a.m.

Agenda: Committee discussion, individual presentations, laboratory overview.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Closed: October 11, 2016, 11:50 a.m. to 1:05 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Open: October 11, 2016, 1:05 p.m. to 4:05 p.m.

Agenda: Committee discussion, individual presentations, laboratory overview.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Open: October 11, 2016, 4:05 p.m. to 5:45 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Closed: October 12, 2016, 8:00 a.m. to 8:20 a.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Open: October 12, 2016, 8:20 a.m. to 11:50 a.m.

Agenda: Committee discussion, individual presentations, laboratory overview.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Closed: October 12, 2016, 11:50 a.m. to 1:05 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Open: October 12, 2016, 1:05 p.m. to 3:05 p.m.

Agenda: Committee discussion, individual presentations, laboratory overview.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Closed: October 12, 2016, 3:05 p.m. to 3:55 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Closed: October 12, 2016, 3:55 p.m. to 4:55 p.m.

Agenda: Committee discussion, individual presentations, laboratory overview.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Closed: October 12, 2016, 4:55 p.m. to 5:55 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Closed: October 13, 2016, 8:00 a.m. to 8:20 a.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Open: October 13, 2016, 8:20 a.m. to 11:50 a.m.

Agenda: Committee discussion, individual presentations, laboratory overview.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Closed: October 13, 2016, 11:50 a.m. to 12:50 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institute on Aging, Biomedical Research Center, 3rd Floor Conference Room, 251 Bayview Boulevard, Baltimore, MD 21224.

Contact Person: Luigi Ferrucci, Ph.D., MD, Scientific Director, National Institute on Aging, 251 Bayview Boulevard, Suite 100, Room 4C225, Baltimore, MD 21224, 410–558–8110, *LF27Z@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: August 19, 2016.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–20347 Filed 8–24–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Review of Support of Competitive Research (SCORE) Applications.

Date: August 25, 2016.

Time: 1:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Room 3An.12N, 45 Center Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Lisa A. Dunbar, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN12, Bethesda, MD 20892, 301–594–2849, *dunbarl@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: August 19, 2016.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–20348 Filed 8–24–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; PQ 11: Mechanisms by which standard-of-care therapies affect immunotherapy.

Date: September 28, 2016.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute, Shady Grove, 9609 Medical Center Drive, Room 7W108, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: Clifford W. Schweinfest, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W108, Rockville, MD 20892–9750, 240–276–6343, *schweinfestcw@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Program Project II (P01).

Date: October 4–5, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington DC/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Sanita Bharti, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W618, Rockville, MD 20892–9750, 240–276–5909, *sanitab@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; PQ 1: Inhibition of tumor growth in pre-malignant fields.

Date: October 13, 2016.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 2W032/034, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: Clifford W. Schweinfest, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W108, Rockville, MD 20892–9750, 240–276–6343, *schweinfestcw@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Clinical and Translational R21: SEP–5.

Date: October 14, 2016.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 2E914, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: Robert E. Bird, Ph.D., Scientific Review Officer, Research Program Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W110, Rockville, MD 20892–9750, 240–276–6344, *birdr@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Provocative Question 7.

Date: October 25, 2016.

Time: 12:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W236, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: Dona Love, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W236, Rockville, MD 20892–9750, 240–276–5264, *donalove@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Research Answers to NCI's Provocative Questions.

Date: October 26, 2016.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 4W034, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: Thomas A. Winters, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W412, Rockville, MD 20892–9750, 240–276–6386, *twinter@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Core Infrastructure and Methodological Research for Cancer Epidemiology Cohorts.

Date: November 1, 2016.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 6W034, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: Thomas A. Winters, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W412, Rockville, MD 20892–9750, 240–276–6386, *twinter@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Clinical and Translational R21: SEP–2.

Date: November 3–4, 2016.

Time: 8:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Yisong Wang, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W240, Rockville, MD 20892–9750, 240–276–7157, *yisong.wang@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI R01/U01 Review.

Date: November 3, 2016.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 2E914, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: Robert E. Bird, Ph.D., Scientific Review Officer, Research Program

Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W110, Rockville, MD 20892–9750, 240–276–6344, *birdr@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Clinical and Translational Exploratory/Developmental Studies (R21): SEP–1.

Date: November 7–8, 2016.

Time: 8:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Dona Love, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W236, Rockville, MD 20892–9750, 240–276–5264, *donalove@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; NCI Clinical and Translational R21: SEP–6.

Date: November 9, 2016.

Time: 8:30 a.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W608, Rockville, MD 20850 (Telephone Conference Call).

Contact Person: Wlodek Lopaczynski, MD, Ph.D., Scientific Review Officer, Research Program Review Branch, Division of Extramural Activities, National Cancer Institute, 9609 Medical Center Drive, Room 7W608, Rockville, MD 20892–9750, 240–276–6458, *lopacw@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: *August 19, 2016.*

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–20346 Filed 8–24–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; 30-Day Comment Request Health Information National Trends Survey V (HINTS V) (National Cancer Institute)

AGENCY: National Institutes of Health.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the National Cancer Institute, the National Institutes of Health, has submitted to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below. This proposed information collection was previously published in the **Federal Register** on June 6, 2016, page 36316 and allowed 60-days for public comment. One public comment was received. The purpose of this notice is to allow an additional 30 days for public comment.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 30-days of the date of this publication.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, *OIRA_submission@omb.eop.gov* or by fax to 202–395–6974, Attention: Desk Officer for NIH.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Bradford W. Hesse, Ph.D., Project Officer, National Cancer Institute, 9609 Medical Center Drive, 3E610, Bethesda, MD 20892–9760 or call non-toll free number 240–276–6721 or email your request, including your address to: *hesseb@mail.nih.gov.*

SUPPLEMENTARY INFORMATION: The National Cancer Institute, NCI, National Institutes of Health, may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

In compliance with section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the National Institutes of Health (NIH) has submitted to the Office of management and Budget (OMB) a request for review and approval of the information collection listed below.

Proposed Collection: Health Information National Trends Survey V (HINTS V), OMB 0925–0538, Exp 04/30/2016. REINSTATEMENT WITH CHANGE, National Cancer Institute (NCI), National Institutes of Health (NIH).

Need and Use of Information Collection: HINTS V will provide NCI with a comprehensive assessment of the American public's current access to and use of information about cancer across the cancer care continuum from cancer prevention, early detection, diagnosis, treatment, and survivorship. The content of the survey will focus on understanding the degree to which members of the general population understand vital cancer prevention messages. More importantly, this NCI survey will couple knowledge-related questions with inquiries into the communication channels through which understanding is being obtained, and assessment of cancer-related behavior. The analyses enabled by the survey will allow NCI and the cancer communication community to refine communication priorities, identify deficits in cancer-related population knowledge, and develop evidence-based strategies for selecting the most effective channels to reach identified demographic population groups.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 2,017.

ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Type of respondent	Number of respondents	Number of responses per respondent	Average time per response (in hours)	Total annual burden hours
Main Study	Individual	3,500	1	30/60	1,750
Pilot Study	Individual	533	1	30/60	267
Total		4,033	4,033		2,017

Dated: August 18, 2016.

Karla Bailey,

Project Clearance Liaison, National Cancer Institute, NIH.

[FR Doc. 2016–20345 Filed 8–24–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2016–0663]

National Maritime Security Advisory Committee; Vacancies

AGENCY: Coast Guard, Department of Homeland Security.

ACTION: Request for applications.

SUMMARY: The Coast Guard seeks applications for membership on the National Maritime Security Advisory Committee. The National Maritime Security Advisory Committee provides advice and makes recommendations on national maritime security matters to the Secretary of Homeland Security via the Commandant of the United States Coast Guard.

DATES: Completed applications should reach the Coast Guard on or before October 24, 2016.

ADDRESSES: Applicants should send a cover letter expressing interest in an appointment to the National Maritime Security Advisory Committee that identify which membership category the applicant is applying under, along with a resume detailing the applicant's experience via one of the following methods:

- *By Email: ryan.f.owens@uscg.mil,* Subject line: National Maritime Security Advisory Committee (preferred);
- *By Fax:* 202–372–8353, ATTN: Mr. Ryan Owens, National Maritime Security Advisory Committee, Alternate Designated Federal Officer; or
- *By Mail:* Mr. Ryan Owens, National Maritime Security Advisory Committee, Alternate Designated Federal Officer, CG–FAC, U.S. Coast Guard Headquarters, 2703 Martin Luther King Jr. Avenue SE., Washington, DC 20593, Stop 7501, Washington, DC 20593–7501.

FOR FURTHER INFORMATION CONTACT: Mr. Ryan Owens, Commandant (CG–FAC–1), the National Maritime Security Advisory Committee Alternate Designated Federal Officer, U.S. Coast Guard Headquarters, 2703 Martin Luther King Jr. Avenue SE., Washington, DC 20593, Stop 7501, Washington, DC 20593–7501, *ryan.f.owens@uscg.mil,* Phone: 202–372–1108, Fax: 202–372–8353.

SUPPLEMENTARY INFORMATION: The National Maritime Security Advisory Committee is an advisory committee established in accordance with the provisions of the Federal Advisory Committee Act, (Title 5 U.S.C. Appendix). As specified in 46 U.S.C. 70112, the National Maritime Security Advisory Committee advises, consults with, and makes recommendations to the Secretary via the Commandant of the Coast Guard on matters relating to national maritime security.

The full Committee normally meets at least two times each fiscal year. Working group meetings and teleconferences are held more frequently, as needed. The Committee may also meet for extraordinary purposes.

Each member serves for a term of 3 years. Members may be considered to serve a maximum of two consecutive terms. While attending meetings or when otherwise engaged in committee business, members may be reimbursed for travel and per diem expenses as permitted under applicable Federal travel regulations. However, members will not receive any salary or other compensation for their service on the National Maritime Security Advisory Committee.

We will consider applications for positions listed in the categories below that will expire or become vacant on December 31, 2016.

Applicants with experience in the following sectors of the marine transportation industry with at least 5 years of practical experience in their field are encouraged to apply. We are looking for:

- At least one individual who represents the interests of the port authorities;
- At least one individual who represents the interests of the facilities owners or operators;
- At least one individual who represents the interests of the terminal owners or operators;
- At least one individual who represents the interests of the vessel owners or operators;
- At least one individual who represents the interests of the maritime labor organizations;
- At least one individual who represents the interests of the academic community;
- At least one individual who represents the interests of State and local governments; and
- At least one individual who represents the interests of the maritime industry.

Due to the nature of National Maritime Security Advisory Committee business, National Maritime Security Advisory Committee members are required to apply for, obtain, and maintain a government national security clearance at the Secret level. The Coast Guard will sponsor and assist candidates with this process.

The Department of Homeland Security does not discriminate in selection of committee members on the basis of race, color, religion, sex, national origin, political affiliation, sexual orientation, gender identity, marital status, disability and genetic information, age, membership in an employee organization, or any other non-merit factor. The Department of Homeland Security strives to achieve a widely diverse candidate pool for all of its recruitment actions.

If you are interested in applying to become a member of the committee, send your complete application package to Mr. Ryan Owens, Alternate Designated Federal Officer of the National Maritime Security Advisory Committee via one of the transmittal methods in the **ADDRESSES** section by the deadline in the **DATES** section of this notice.

Dated: August 21, 2016.

V.B. Gifford,

Captain, U.S. Coast Guard, Director of Inspections and Compliance.

[FR Doc. 2016–20384 Filed 8–24–16; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2007–0008]

National Advisory Council; Meeting

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Committee management; notice of Federal Advisory Committee Meeting.

SUMMARY: The Federal Emergency Management Agency (FEMA) National Advisory Council (NAC) will meet in person on September 13–15, 2016 in Arlington, VA. The meeting will be open to the public.

DATES: The NAC will meet Tuesday, September 13, 2016, from 9:00 a.m. to 2:00 p.m., Wednesday, September 14, 2016 from 8:30 a.m. to 5:30 p.m., and Thursday, September 15 from 8:30 a.m. to 11:30 a.m. Eastern Daylight Time (EDT). Please note that the meeting may close early if the NAC has completed its business.

ADDRESSES: The meeting will be held at The Doubletree located at 300 Army Navy Drive, Arlington, VA 22202. Attendees should register with FEMA prior to the meeting by providing your name, telephone number, email address, title, and organization to the person listed in **FOR FURTHER INFORMATION CONTACT** below.

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact the person listed in **FOR FURTHER INFORMATION CONTACT** below as soon as possible.

To facilitate public participation, members of the public are invited to provide written comments on the issues to be considered by the NAC. The "Agenda" section below outlines these issues. Written comments must be submitted and received by 5:00 p.m. EDT on September 11, 2016, identified by Docket ID FEMA–2007–0008, and submitted by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: FEMA-RULES@fema.dhs.gov.* Include the docket number in the subject line of the message.
- *Fax:* (540) 504–2331.
- *Mail:* Regulatory Affairs Division, Office of Chief Counsel, FEMA, 500 C Street SW., Room 8NE, Washington, DC 20472–3100.

Instructions: All submissions received must include the words "Federal Emergency Management Agency" and the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read comments received by the NAC, go to *http://www.regulations.gov,* and search for the Docket ID listed above.

A public comment period will be held on Wednesday, September 14 from 3:00 p.m. to 3:15 p.m. EDT. All speakers must limit their comments to 3 minutes. Comments should be addressed to the NAC. Any comments not related to the agenda topics will not be considered by the NAC. To register to make remarks during the public comment period, contact the individual listed below by September 11, 2016. Please note that the public comment period may end before the time indicated, following the last call for comments.

FOR FURTHER INFORMATION CONTACT: Deana Platt, Designated Federal Officer, Office of the National Advisory Council, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472–3184, telephone (202) 646–2700, fax (540) 504–2331, and email *FEMA–NAC@fema.dhs.gov.* The NAC Web site is: *http://www.fema.gov/national-advisory-council.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. Appendix.

The NAC advises the FEMA Administrator on all aspects of emergency management. The NAC incorporates state, local, and tribal government, and private sector input in the development and revision of FEMA plans and strategies. The NAC includes a cross-section of officials, emergency managers, and emergency response providers from state, local, and tribal governments, the private sector, and nongovernmental organizations.

Agenda: On Tuesday, September 12, the NAC will review FEMA's response from the NAC's May 2016 recommendations, receive briefings from FEMA Executive Staff (Office of Response and Recovery, National Preparedness Directorate, and Federal Insurance and Mitigation Administration), and will hear from a FEMA Regional Administrator about activities in the FEMA Regions.

On Wednesday, September 13, the NAC will engage in an open discussion with the FEMA Administrator and FEMA Deputy Administrator and hear from a panel of experts on disaster-related technology. The three NAC subcommittees (Federal Insurance and Mitigation Subcommittee, Preparedness and Protection Subcommittee, and Response and Recovery Subcommittee) and the Spontaneous Volunteers Ad Hoc Subcommittee will provide reports to the NAC about their work, whereupon the NAC will deliberate on any recommendations presented in the subcommittees' reports, and, if appropriate, vote on recommendations for the FEMA Administrator.

On Thursday, September 15, the NAC will review agreed upon recommendations and receive an update on tribal issues as related to emergency management.

The full agenda and any related documents for this meeting will be posted by Friday, September 9 on the NAC Web site at *http://www.fema.gov/national-advisory-council.*

Dated: August 17, 2016.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2016–20326 Filed 8–24–16; 8:45 am]

BILLING CODE 9111–48–P

DEPARTMENT OF HOMELAND SECURITY

Immigration and Customs Enforcement

Agency Information Collection Activities: 287(g) Candidate Questionnaire, Form No. 70–009; Extension, Without Change; Comment Request; OMB Control No. 1653–0047

AGENCY: U.S. Immigration and Customs Enforcement, Department of Homeland Security.

ACTION: 30-Day notice.

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (USICE), is submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies. This information collection was previously published in the **Federal Register** on June 22, 2016, Vol. 81 No. 40716 allowing for a 60 day comment period. No comments were received on this information collection. The purpose of this notice is to allow an additional 30 days for public comments.

Written comments and suggestions regarding items contained in this notice and especially with regard to the estimated public burden and associated response time should be directed to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for U.S. Immigration and Customs Enforcement, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who

are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved Information Collection.

(2) *Title of the Form/Collection:* 287(g) Candidate Questionnaire.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* 70–009, U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: State, Local or Tribal governments. This questionnaire is used for the purposes of determining whether or not a state or local law enforcement officer will be granted Federal immigration enforcement authority under the 287(g) program. This information is used by program managers and trainers in the 287(g) program to make a decision for a potential candidate to be admitted into the program.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 75 responses at 25 minutes (0.416 hours) per response

(6) *An estimate of the total public burden (in hours) associated with the collection:* 31 annual burden hours.

Dated: August 22, 2016.

Scott Elmore,

Program Manager, Forms Management Office, Office of the Chief Information Officer, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

[FR Doc. 2016–20392 Filed 8–24–16; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Extension of Agency Information Collection Activity Under OMB Review: Aviation Security Customer Satisfaction Performance Measurement Passenger Survey

AGENCY: Transportation Security Administration, DHS.

ACTION: 30-day notice.

SUMMARY: This notice announces that the Transportation Security Administration (TSA) has forwarded the Information Collection Request (ICR), Office of Management and Budget (OMB) control number 1652–0013, abstracted below to OMB for review and approval of an extension of the currently approved collection under the Paperwork Reduction Act (PRA). The ICR describes the nature of the information collection and its expected burden. TSA published a **Federal Register** notice, with a 60-day comment period soliciting comments, of the following collection of information on June 7, 2016, 81 FR 36555. The collection involves surveying travelers to measure customer satisfaction of aviation security in an effort to more efficiently manage its security screening performance at airports.

DATES: Send your comments by September 26, 2016. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, OMB. Comments should be addressed to Desk Officer, Department of Homeland Security/TSA, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Christina A. Walsh, TSA PRA Officer, Office of Information Technology (OIT), TSA–11, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598–6011; telephone (571) 227–2062; email *TSAPRA@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The ICR documentation is available at *http://www.reginfo.gov.* Therefore, in preparation for OMB review and approval of the following information collection, TSA is soliciting comments to—

(1) Evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Information Collection Requirement

Title: Aviation Security Customer Satisfaction Performance Measurement Passenger Survey.

Type of Request: Extension of a currently approved collection.

OMB Control Number: 1652–0013.

Forms(s): Survey.

Affected Public: Travelling public.

Abstract: TSA, with OMB's approval, has conducted surveys of passengers and now seeks approval to continue this effort. TSA plans to conduct passenger surveys at airports nationwide. The surveys will be administered using either an intercept methodology [1] or a systematic sampling methodology.[2] Before each survey collection at an airport, TSA personnel decide the method by which passengers will be asked to complete and return the survey. Under both methodologies, TSA personnel who are not in uniform hand deliver business card survey forms to passengers immediately following the passenger's experience with TSA's checkpoint security functions. Passengers are invited, though not required, to complete and return the survey using either a web-based portal on their own devices, responding to TSA personnel capturing verbal responses to the survey in real time using the same web-based portal on portable devices, or by responding in writing to the survey questions on the customer satisfaction card and depositing the card in a drop-box at the airport or using U.S. mail.

TSA uses the intercept methodology or the systematic sampling methodology to randomly select passengers to complete the survey in an effort to gain survey data representative of all passenger demographics, including passengers who—

- Travel on weekdays or weekends;
- Travel in the morning, mid-day, or evening;
- Pass through each of the different security screening locations in the airport;

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[1] The intercept methodology utilizes surveys that are conducted in-person, generally in a public place or business.

[2] Systematic sampling methodology is a method of choosing a random sample from among a larger population. The process of systematic sampling typically involves first selecting a fixed starting point in the larger population and then obtaining subsequent observations by using a constant interval between samples taken.

- Are subject to more intensive screening of their baggage or person; and
- Experience different volume conditions and wait times as they proceed through the security checkpoints.

Each survey includes 10 to 15 questions pulled from a list of 82 questions previously approved by OMB. Each question promotes a quality response so that TSA can identify areas in need of improvement. All questions concern aspects of the passenger's security screening experience, such as:

- Confidence in Personnel.
- Confidence in Screening Equipment.
- Confidence in Security Procedures.
- Convenience of Divesting.
- Experience at Checkpoint.
- Satisfaction with Wait Time.
- Separation from Belongings.
- Separation from Others in Party.
- Stress Level.

TSA personnel use random procedures to select passengers to voluntarily participate in the survey until TSA obtains the desired sample size. The samples may be selected with one randomly selected time and location or span multiple times and locations. All responses are voluntary and there is no burden on passengers who choose not to respond.

TSA intends to collect this information in order to continue to assess customer satisfaction in an effort to more efficiently manage its security screening performance at airports. TSA can use this detailed, airport-specific data to enhance customer experiences and its performance at specific airports.

Number of Respondents: 9,600.

Estimated Annual Burden Hours: An estimated 800 hours annually.

Dated: August 19, 2016.

Christina A. Walsh,

TSA Paperwork Reduction Act Officer, Office of Information Technology.

[FR Doc. 2016–20398 Filed 8–24–16; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLOR957000–L14400000–BJ0000–16XL1109AF: HAG 16–0205]

Filing of Plats of Survey: Oregon/Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The plats of survey of the following described lands are scheduled to be officially filed in the Bureau of Land Management, Oregon State Office, Portland, Oregon, 30 days from the date of this publication.

Willamette Meridian

Oregon

T. 20 S., R. 5 W., accepted July 25, 2016
T. 34 S., R. 2 E, accepted August 9, 2016
Tps. 15 & 16 S., R. 11 E., accepted August 9, 2016

ADDRESSES: A copy of the plats may be obtained from the Public Room at the Bureau of Land Management, Oregon State Office, 1220 SW. 3rd Avenue, Portland, Oregon 97204, upon required payment.

FOR FURTHER INFORMATION CONTACT: Kyle Hensley, (503) 808–6124, Branch of Geographic Sciences, Bureau of Land Management, 1220 SW. 3rd Avenue, Portland, Oregon 97204. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: A person or party who wishes to protest against this survey must file a written notice with the Oregon State Director, Bureau of Land Management, stating that they wish to protest. A statement of reasons for a protest may be filed with the notice of protest and must be filed with the Oregon State Director within thirty days after the protest is filed. If a protest against the survey is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protests have been dismissed or otherwise resolved. Before including your address, phone number, email address, or other personally identifying information in your comment, you should be aware that your entire comment—including your personally identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personally identifying information from public review, we cannot guarantee that we will be able to do so.

Mary J.M. Hartel,

Chief Cadastral Surveyor of Oregon/Washington.

[FR Doc. 2016–20380 Filed 8–24–16; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCA942000 L57000000.BX0000 15X L5017AR]

Filing of Plats of Survey: California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The plats of survey of lands described below are scheduled to be officially filed in the Bureau of Land Management, California State Office, Sacramento, California.

DATES: September 26, 2016.

ADDRESSES: A copy of the plats may be obtained from the California State Office, Bureau of Land Management, 2800 Cottage Way, Sacramento, California 95825, upon required payment.

FOR FURTHER INFORMATION CONTACT: Chief, Branch of Geographic Services, Bureau of Land Management, California State Office, 2800 Cottage Way W–1623, Sacramento, California 95825, 1–916–978–4310. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: A person or party who wishes to protest a survey must file a notice that they wish to protest with the Chief, Branch of Geographic Services. A statement of reasons for a protest may be filed with the notice of protest and must be filed with the Chief, Branch of Geographic Services within thirty days after the protest is filed. If a protest against the survey is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protests have been dismissed or otherwise resolved. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Mount Diablo Meridian, California

T. 5 N., R. 4 E., the dependent resurvey of a portion of the south boundary and the metes-and-bounds survey of certain parcels, accepted June 28, 2016.

T. 20 N., R. 7 E., the dependent resurvey of a portion of the subdivisional lines and a portion of the Brown Bear Lode (U.S. Mineral Survey No. 5690) and the subdivision of section 11, accepted July 22, 2016.

T. 6 N., R. 12 E., the dependent resurvey of a portion of the subdivisional lines and the subdivision of section 24, accepted August 5, 2016.

T. 6 N., R. 13 E., the corrective resurvey of a portion of the subdivisional lines and a portion of the subdivision of section 20, and the dependent resurvey of a portion of the subdivision of section 19, accepted August 8, 2016.

San Bernardino Meridian, California

T. 4 S., R. 4 E., a supplemental plat, showing a corrected distance on the north line of lot 3 and showing the bearing and distance of the west line of lot 1 in the NE 1/4 of the SE 1/4 of section 24, accepted July 25, 2016.

T. 2 N., R. 8 W., the metes-and-bounds survey of Tract 37, accepted August 1, 2016.

Authority: 43 U.S.C., Chapter 3.

Dated: August 10, 2016.

Jon L. Kehler,

(Acting) Chief Cadastral Surveyor, California.

[FR Doc. 2016–20388 Filed 8–24–16; 8:45 am]

BILLING CODE 4310–40–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–962]

Certain Resealable Packages With Slider Devices; Commission Decision To Review-in-Part an Initial Determination Finding No Violation of Section 337; On Review, To Modify-in-Part the Initial Determination and To Take No Position on One Issue; Affirmance of the Finding of No Violation and Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review-in-part a final initial determination ("ID") of the presiding administrative law judge ("ALJ") finding no violation of section 337. On review, the Commission has determined to modify-in-part the ID and to take no position with respect to one issue. The Commission has also determined to affirm the ID's finding of no violation of section 337 and has terminated the investigation.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708–2310. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on July 20, 2015, based on a complaint filed on behalf of Reynolds Presto Products Inc. of Appleton, Wisconsin. 80 FR 42839–40. The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based upon the importation in the United States, the sale for importation, and the sale within the United States after importation of certain resealable packages with slider devices by reason of infringement of certain claims of U.S. Patent Reexamination Certificate No. 6,427,421 and U.S. Patent Nos. 6,524,002 and 7,311,443. The complaint further alleges the existence of a domestic industry. The Commission's notice of investigation named Inteplast Group, Ltd. of Livingston, New Jersey and Minigrip, LLC of Alpharetta, Georgia as respondents. The Office of Unfair Import Investigations is participating in this investigation.

On March 14, 2016, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 8) granting complainant's motion for summary determination that it has satisfied the economic prong of the domestic industry requirement under 19 U.S.C. 1337(a)(3)(A) and (B) for all asserted patents.

On June 20, 2016, the ALJ issued his final ID finding no violation of section 337. The ALJ found that none of respondents' accused products infringe any of the asserted patents. He also found that the technical prong of the domestic industry requirement had been satisfied with respect to the '443 patent, but not with respect to the '421 or '002 patents. The ALJ also issued his recommended determination (RD) on remedy and bond. The ALJ recommended, in the event the Commission finds a violation, that both limited exclusion and cease and desist orders should issue against infringing products and each respondent.

On July 6, 2016, complainant and respondents each filed a petition for review of the final ID. On July 14, 2016, complainant, OUII, and respondents each filed a response to the opposing petition.

Having examined the record of this investigation including the ID, the parties' petitions for review, and the responses thereto, the Commission has determined to review-in-part the final ID. Specifically, the Commission has determined to review (1) the ID's finding of no invalidity of claim 1 of the '443 patent under 35 U.S.C. 102(b); and (2) the ID's analysis regarding infringement of the '421 patent. The Commission has determined not to review the remainder of the final ID.

On review with respect to issue (1), the Commission determines to take no position on the ID's finding of no invalidity of claim 1 of the '443 patent under § 102(b). On review with respect to issue (2), the Commission modifies-in-part the final ID. Specifically, the Commission supplements the ID's finding of no infringement under the doctrine of equivalents of asserted claim 39 of the '421 patent with respect to the "feeding a zipper sheet" limitation (ID at 45–49) with the following:

> Presto's doctrine of equivalents arguments are so broad that they read the limitation "releasably adhered" out of asserted claim 39. "Under the all elements rule, there can be no infringement under the doctrine of equivalents if even one limitation of a claim or its equivalent is not present in the accused device. . . . Thus, if a court determines that a finding of infringement under the doctrine of equivalents 'would entirely vitiate a particular claim[ed] element,' [as the case is here with respect to the "releasably adhered" limitation] then the court should rule that there is no infringement under the doctrine of equivalents." *Lockheed Martin Corp.* v. *Space Systems/Loral, Inc.,* 324 F.3d 1308, 1321 (Fed. Cir. 2003) (citations omitted).

The Commission therefore affirms the ID's finding of no violation of section 337 and terminates the investigation.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in part 210 of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

By order of the Commission.

Issued: August 19, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–20357 Filed 8–24–16; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–808 (Third Review)]

Hot-Rolled Carbon Steel Flat Products From Russia; Scheduling of an Expedited Five-Year Review

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of an expedited review pursuant to the Tariff Act of 1930 (“the Act”) to determine whether revocation of the antidumping duty order on hot-rolled carbon steel flat products from Russia would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

DATES: *Effective Date:* August 5, 2016.

FOR FURTHER INFORMATION CONTACT: Michael Szustakowski ((202) 205–3169), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission’s TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for this review may be viewed on the Commission’s electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On August 5, 2016, the Commission determined that the domestic interested party group response to its notice of institution (81 FR 26256, May 2, 2016) of the subject five-year review was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting a full review.[1] Accordingly, the Commission determined that it would conduct an expedited review pursuant to section 751(c)(3) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(3)).

For further information concerning the conduct of this review and rules of general application, consult the Commission’s Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Staff report.—A staff report containing information concerning the subject matter of the review will be placed in the nonpublic record on August 31, 2016, and made available to persons on the Administrative Protective Order service list for this review. A public version will be issued thereafter, pursuant to section 207.62(d)(4) of the Commission’s rules.

Written submissions.—As provided in section 207.62(d) of the Commission’s rules, interested parties that are parties to the review and that have provided individually adequate responses to the notice of institution,[2] and any party other than an interested party to the review may file written comments with the Secretary on what determination the Commission should reach in the review. Comments are due on or before September 6, 2016 and may not contain new factual information. Any person that is neither a party to the five-year review nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the review by September 6, 2016. However, should the Department of Commerce extend the time limit for its completion of the final results of its review, the deadline for comments (which may not contain new factual information) on Commerce’s final results is three business days after the issuance of Commerce’s results. If comments contain business proprietary information (BPI), they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission’s rules. The Commission’s rules with respect to filing were revised effective July 25, 2014. *See* 79 FR 35920 (June 25, 2014), and the revised Commission Handbook on E-filing, available from the Commission’s Web site at *https://edis.usitc.gov.*

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the review must be served on all other parties to the review (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission’s rules.

By order of the Commission.

Issued: August 19, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–20334 Filed 8–24–16; 8:45 am]

BILLING CODE 7020–02–P

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[1] A record of the Commissioners’ votes, the Commission’s statement on adequacy, and any individual Commissioner’s statements will be available from the Office of the Secretary and at the Commission’s Web site.

[2] The Commission has found the responses submitted by AK Steel Corporation, ArcelorMittal USA LLC, Nucor Corporation, SSAB Enterprises LLC, Steel Dynamics Inc., and United States Steel Corporation to be individually adequate. Comments from other interested parties will not be accepted (*see* 19 CFR 207.62(d)(2)).

INTERNATIONAL TRADE COMMISSION

Miscellaneous Tariff Bill (MTB) Petition System Submission of Petition and Comment Forms for OMB Review

AGENCY: United States International Trade Commission.

ACTION: Notice of submission of request for approval of a questionnaire to the Office of Management and Budget. This notice is being given pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Purpose of Information Collection: The information requested by these forms is for use by the Commission in connection with evaluating miscellaneous tariff petitions submitted under the authority of American Manufacturing Competitiveness Act of 2016 (Pub. L. 114–159 approved May 20, 2016). Section 3 of this Act establishes a process for the submission and consideration of petitions and public comments for duty suspensions and reductions for imported goods in the Harmonized Tariff Schedule of the United States. The collection periods are 60-day periods starting October 15, 2016 and October 15, 2019.

Summary of Proposal:

(1) Number of forms submitted: 2.

(2) Title of forms: MTB Petition System: Information for Petitions Form and MTB Petition System: Information for Comments Form.

(3) Type of request: New.

(4) Frequency of use: Once.

(5) Description of affected industry: Domestic firms.

(6) Estimated number of petitioners and commenters: up to 5,000 petitions; 14,000 comments.

(7) Estimated total number of hours to complete the form: 8 hours for compiling information and submitting petitions and 2 hours to draft and submit comments.

(8) Information obtained from the forms that qualifies as confidential business information will be so treated by the Commission.

Additional Information or Comment: Copies of the forms and supporting documents may be obtained from Jennifer Rohrbach, USITC MTB Program Manager, Office of Operations (*jennifer.rohrbach@usitc.gov* or 202–205–2088) or Philip Stone, Office of Industries MTB Coordinator (*philip.stone@usitc.gov* or 202–205–3424). Comments about the proposal should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Room 10102 (Docket Library), Washington, DC 20503, ATTENTION: Docket Librarian. All comments should be specific, indicating which part of the form is objectionable, describing the concern in detail, and including specific suggested revisions or language changes. Copies of any comments should be provided to Kirit Amin, Chief Information Officer, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, who is the Commission's designated Senior Official under the Paperwork Reduction Act. General information concerning the Commission may also be obtained by accessing its Internet address (*https://www.usitc.gov*). Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Secretary at 202–205–2000.

By order of the Commission.

Issued: August 22, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–20406 Filed 8–24–16; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1011]

Certain Inkjet Printers, Printheads, and Ink Cartridges, Components Thereof, and Products Containing the Same; Commission's Determination Not To Review Initial Determinations Terminating Certain Respondents Based on Settlement and Withdrawal of the Complaint as to the Remaining Respondents; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's ("ALJ") initial determinations ("ID") (Order Nos. 5 and 6) terminating certain respondents based on settlement and withdrawal of the complaint as to the remaining respondents.

FOR FURTHER INFORMATION CONTACT: Amanda Pitcher Fisherow, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2737. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on July 1, 2016, based on a complaint filed on behalf of HP Inc. of Palo Alto, California ("complainant"). 81 *FR* 43244 (July 1, 2016). The complaint alleges violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the sale for importation, importation, or sale within the United States after importation of certain inkjet printers, printheads, and ink cartridges, components thereof, and products containing same by reason of infringement of one or more of U.S. Patent No. 6,270,201; U.S. Patent No. 6,491,377; U.S. Patent No. 6,260,952; U.S. Patent No. 7,004,564; U.S. Patent No. 7,090,343; and U.S. Patent No. 7,744,202. The Commission's notice of investigation named the following respondents: Memjet, Ltd. of Dublin, Ireland, Memjet US Services, Inc. of San Diego, California, Memjet Home and Office, Inc. of Eagle, Idaho, Memjet North Ryde Pty Ltd. of New South Wales, Australia, Memjet Technology Ltd. of Dublin, Ireland, Memjet Holdings Ltd. of Dublin, Ireland (collectively "the Memjet respondents"); Afinia LLC (d/b/a Afinia Label) of Chanhassen, Minnesota; Astro Machine Corporation of Elk Grove Village, Illinois; Colordyne Technologies, LLC of Brookfield, Wisconsin; Formax Technologies, Inc. of Dover, New Hampshire; Neopost USA, Inc. (d/b/a Neopost Northwest, Neopost Northeast, Neopost Priority Systems, and/or Neopost Southeast) of Milford, Connecticut; Printware LLC of Eagan, Minnesota; VIPColor Technologies USA, Inc. of Newark, California; ABC Office (d/b/a Brent Barlow) of Kaysville, Utah; All for Mailers, Inc. of Feasterville, Pennsylvania; Fernqvist Labeling Solutions, Inc. of Mountain View, California; Information Management Services LLC (d/b/a MyBinding.com) of Hillsboro, Oregon; JMP Business Systems, Inc. of Clovis, California; Mono Machines LLC of New York, New York; Ordway Corporation (d/b/a Print & Finishing Solutions) of Placentia, California; Pacific Barcode Inc. of Temecula, California; Pacific Code & Label, Inc. of Portland, Oregon; Parts Now! LLC of Madison, Wisconsin; Trademark Copysystems Inc. (d/b/a Addrex—Addresser Sales Company) of Cleveland, Ohio; and Vivid Data Group LLC of Dallas, Texas. The Office of Unfair Import Investigations was named as a party.

On July 7, 2016, complainant and the Memjet respondents filed a joint motion to terminate the Memjet respondents based on settlement. The joint motion asserted that there are no other agreements between complainant and the Memjet respondents.

Also on July 7, 2016, complainant filed a motion to terminate the remaining non-Memjet respondents based on withdrawal of the complaint. The complainant represented that the only agreement concerning the subject matter of the investigation is the settlement agreement with the Memjet respondents. Complainant stated the Memjet respondents do not oppose the motion. On July 18, 2016, OUII filed a response indicating it does not oppose the motion based on settlement, and the motion based on withdrawal of the complaint.

On August 1, 2016, the ALJ issued an ID (Order No. 5) terminating the Memjet respondents based on settlement. The ALJ found that all of the requirements of Commission rule 210.21(a)–(b), 19 CFR 210.21(a)–(b), had been met and that there were no public interest concerns that would weigh against termination. No petitions for review were filed.

Also on August 1, 2016, the ALJ issued an ID (Order No. 6) terminating the non-Memjet respondents based on withdrawal of the complaint. The ALJ found that all of the requirements Commission rule 210.21(a), 19 CFR 210.21(a), had been met and that there were no extraordinary circumstances that would prevent the requested termination. No petitions for review were filed.

The Commission has determined not to review the subject IDs and terminates the investigation.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: August 19, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–20331 Filed 8–24–16; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Office of the Secretary

Senior Executive Service; Appointment of Members to the Performance Review Board

Title 5 U.S.C. 4314(c)(4) provides that Notice of the Appointment of the individual to serve as a member of the Performance Review Board of the Senior Executive Service shall be published in the **Federal Register**.

The following individuals are hereby appointed to serve on the Department's Performance Review Board:

Permanent Membership

Chair—Deputy Secretary—Christopher P. Lu
Vice-Chair—Assistant Secretary for Administration and Management—T. Michael Kerr
Alternate Vice-Chair—Chief Human Capital Officer—Sydney T. Rose
Executive Secretary—Director, Executive Resources—Lucy Cunningham
Performance Officer—Director, Performance Management Center—Holly A. Donnelly

Rotating Membership—Appointments Expire on 09/30/17

BLS—Jay A. Mousa, Associate Commissioner for Office of Field Operations
BLS—Nancy F. Ruiz de Gamboa, Assistant Commissioner for Office of Administration
ETA—Leslie G. Range, Regional Administrator, Atlanta
MSHA—Patricia W. Silvey, Deputy Assistant Secretary for Operations
OASAM—Cheryl A. Greenaugh, Director, Chief Information Program Management Office
OASAM—Naomi M. Barry-Perez, Director, Civil Rights Center
OFCCP—Debra A. Carr, Division of Policy, Planning and Program Development
OFCCP—Diana S. Sen, Regional Director, New York
OLMS—Stephen J. Willertz, Director, Office of Enforcement and International Union Audits
OWCP—Antonio A. Rios, Director, Longshore and Harbor Workers' Compensation Program
SOL—Michael D. Felsen, Regional Solicitor, Boston
SOL—Jeffrey L. Nesvet, Associate Solicitor for Employment and Training Legal Services
WB—Joan Y. Harrigan-Farrelly, Deputy Director
WHD—Patricia J. Davidson, Deputy Administrator, Office of Program Operations

Temporary Membership—Appointment Expires on 01/20/17

OASAM—Charlotte A. Hayes, Deputy Assistant Secretary for Policy

FOR FURTHER INFORMATION CONTACT: Ms. Lucy Cunningham, Director, Office of Executive Resources, Room N2453, U.S. Department of Labor, Frances Perkins Building, 200 Constitution Ave. NW., Washington, DC 20210, telephone: (202) 693–6624.

Dated: August 17, 2016.

Thomas E. Perez,

Secretary of Labor.

[FR Doc. 2016–20415 Filed 8–24–16; 8:45 am]

BILLING CODE 4510–04–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2016–0002]

Federal Advisory Council on Occupational Safety and Health (FACOSH)

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Announcement of FACOSH meeting.

SUMMARY: The Federal Advisory Council on Occupational Safety and Health (FACOSH) will meet Thursday, September 8, 2016, in Washington, DC.

DATES: *FACOSH meeting:* FACOSH will meet from 1 to 4 p.m., Thursday, September 8, 2016.

Submission of comments, requests to speak, speaker presentations, and requests for special accommodations: You must submit (postmark, send, transmit, deliver) comments, requests to speak at the FACOSH meeting, speaker presentations, and requests for special accommodations to attend the meeting by September 1, 2016.

ADDRESSES:

FACOSH meeting: FACOSH will meet in Room N–3437, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

Submission of comments, requests to speak, and speaker presentations: You may submit comments, requests to speak at the FACOSH meeting, and speaker presentations using one of the following methods:

Electronically: You may submit materials, including attachments, electronically at *http://www.regulations.gov,* the Federal eRulemaking Portal. Follow the online instructions for making submissions;

Facsimile: If your submission, including attachments, does not exceed 10 pages, you may fax it to the OSHA Docket Office at (202) 693–1648; or

Mail, express delivery, hand delivery, or messenger/courier service: You may submit materials to the OSHA Docket Office, Docket No. OSHA–2016–0002, Room N–2625, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2350 (OSHA TTY (877) 889–5627). Deliveries (hand, express mail, messenger/courier service) are accepted during the Department's and the OSHA Docket Office's normal business hours, 8:15 a.m.—4:45 p.m., weekdays.

Requests for special accommodations to attend the FACOSH meeting: You may submit requests for special accommodations by hard copy, email, or telephone to Ms. Frances Owens, OSHA Office of Communications, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; email *owens.frances@dol.gov;* telephone (202) 693–1904.

Instructions: All submissions must include the agency name and docket number for this **Federal Register** notice. Due to security-related procedures, receipt of submissions by regular mail may result in a significant delay. Please contact the OSHA Docket Office for information about security procedures for making submissions by hand delivery, express delivery, and messenger/courier service. For additional information making submissions, see Public Participation in the **SUPPLEMENTARY INFORMATION** section of this notice.

OSHA will post comments, requests to speak, and speaker presentations, including any personal information provided, without change in the FACOSH public docket and submissions may be available online at *http://www.regulations.gov*. Therefore, OSHA cautions individuals about submitting certain personal information, such as Social Security numbers and birthdates.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Mr. Frank Meilinger, Director, OSHA Office of Communications, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–1999; email *meilinger.francis2@dol.gov*.

For general information: Mr. Francis Yebesi, Director, OSHA Office of Federal Agency Programs, Room N–3622, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2122; email *ofap@dol.gov*.

SUPPLEMENTARY INFORMATION:

FACOSH will meet September 8, 2016, in Washington, DC. The meeting is open to the public. Some FACOSH members may attend the meeting electronically.

The tentative agenda for the FACOSH meeting includes:

- An update on federal agencies' efforts on improving workplace safety and health and return-to-work outcomes for federal workers who sustain injuries or illnesses in the performance of duty;
- Updates from the FACOSH subcommittee reviewing the status of Federal Field Safety and Health Councils;
- The U.S. Department of Labor's 2015 data collection of federal agency injuries and illnesses;
- OSHA activities to protect workers from the Zika Virus;
- The U.S. Department of Defense's Implementation of a Safety and Health Management System;
- The status of the OSHA Safety and Health Program Management Guidelines; and
- Developing guidelines for training senior federal agency management on occupational safety and health issues.

FACOSH is authorized by 5 U.S.C. 7902; section 19 of the Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 668); and Executive Order 11612, as amended, to advise the Secretary of Labor (Secretary) on all matters relating to the occupational safety and health of federal employees. This includes providing advice on how to reduce and keep to a minimum the number of injuries and illnesses in the federal workforce, and how to encourage each federal Executive Branch department and agency to establish and maintain effective occupational safety and health programs. FACOSH operates in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and its implementing regulations (41 CFR part 102–3).

OSHA transcribes and prepares detailed minutes of FACOSH meetings. The Agency posts meeting transcripts and minutes plus other materials presented at the FACOSH meeting in the public record of the meeting.

Public Participation, Submissions, and Access to Public Record

FACOSH meeting: FACOSH meetings are open to the public. Individuals attending FACOSH meetings at the U.S. Department of Labor must enter at the Visitors' Entrance, 3rd and C Streets NW., and pass through building security. Attendees must have valid government-issued photo identification to enter. For additional information about building security measures, and requests for special accommodations for attending the FACOSH meeting, please contact Ms. Owens (see **ADDRESSES** section).

Submission of comments. You may submit comments, including data and other information, using one of the methods listed in the **ADDRESSES** section. Your submissions, including attachments and other materials, must identify the agency name and the OSHA docket number for this **Federal Register** notice (Docket No. OSHA–2016–0002). You may submit supplementary materials electronically. If, instead, you wish to submit hard copies of supplementary materials, you must submit them to the OSHA Docket Office following the instructions in the **ADDRESSES** section. The additional materials must clearly identify your electronic submission by name, date, and docket number. OSHA will provide copies of submissions to FACOSH members.

Because of security-related procedures, receipt of submissions by regular mail may result a significant delay. For information about security procedures concerning submissions by hand, express delivery, and messenger/courier service, please contact the OSHA Docket Office (see **ADDRESSES** section).

Submission of requests to speak and speaker presentations. You may submit a request to speak to FACOSH and speaker presentations in advance by one of the methods listed in the **ADDRESSES** section or sign up at the FACOSH meeting to speak. Your request must state:

- The amount of time you request to speak;
- The interest you represent (*e.g.,* organization name), if any; and,
- A brief outline of your presentation.

PowerPoint speaker presentations and other electronic materials must be compatible with Microsoft Office 2010 formats. The FACOSH chair may grant requests to address FACOSH at his discretion, and as time and circumstances permit.

Access to submissions and public record. OSHA places comments, requests to speak, speaker presentations, meeting transcripts and minutes, and other documents presented at the FACOSH meeting in the public record without change. Those documents also may be available online at *http://www.regulations.gov*. Therefore, OSHA cautions individuals about submitting certain personal information, such as Social Security numbers and birthdates.

To read or download documents in the public record, go to Docket No. OSHA–2016–0002 at *http://www.regulations.gov*. Although all meeting documents are listed in the index of that Web page, some documents (*e.g.,* copyrighted materials) are not publicly available to read or download. All meeting documents, including copyrighted materials, are available at the OSHA Docket Office.

Information about using *http://www.regualtions.gov* to make submissions and access the record of FACOSH meetings is available at that Web page. Please contact the OSHA Docket Office for assistance with making submissions and obtaining documents in the FACOSH record, and for information about materials that not available on *http://www.regulations.gov*.

Electronic copies of this **Federal Register** notice are available at *http://www.regulations.gov*. This notice, as well as news releases and other relevant information about FACOSH, also is available at OSHA's Web page at *http://www.osha.gov/*.

Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice pursuant to 5 U.S.C. 7902; 5 U.S.C. App. 2; 29 U.S.C. 668; Executive Order 12196 (45 CFR 12629 (2/27/1980)), as amended; 41 CFR part 102–3; and Secretary of Labor's Order No. 1–2012 (77 FR 3912).

Signed at Washington, DC, on August 19, 2016.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2016–20358 Filed 8–24–16; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Advisory Board on Toxic Substances and Worker Health: Subcommittee on Evidentiary Requirements for Part B Lung Disease; Meeting

AGENCY: Office of Workers' Compensation Programs, Labor.

ACTION: Meeting notice.

SUMMARY: Announcement of meeting of the Subcommittee on Evidentiary Requirements for Part B Lung Disease of the Advisory Board on Toxic Substances and Worker Health (Advisory Board) for the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

DATES: The subcommittee will meet via teleconference on September 21, 2016, from 1 p.m. to 4 p.m. Eastern Time.

FOR FURTHER INFORMATION CONTACT: You may contact Antonio Rios, Designated Federal Officer, at *rios.antonio@dol.gov*, or Carrie Rhoads, Alternate Designated Federal Officer, at *rhoads.carrie@dol.gov*, U.S. Department of Labor, 200 Constitution Avenue NW., Suite S–3524, Washington, DC 20210, telephone (202) 343–5580. This is not a toll-free number.

For Press Inquiries Contact: For press inquiries: Ms. Amanda McClure, Office of Public Affairs, U.S. Department of Labor, Room S–1028, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–4672; email *mcclure.amanda.c@dol.gov.*

SUPPLEMENTARY INFORMATION: The Advisory Board is mandated by Section 3687 of EEOICPA. The Secretary of Labor established the Board under this authority and Executive Order 13699 (June 26, 2015). The purpose of the Advisory Board is to advise the Secretary with respect to: (1) The Site Exposure Matrices (SEM) of the Department of Labor; (2) medical guidance for claims examiners for claims with the EEOICPA program, with respect to the weighing of the medical evidence of claimants; (3) evidentiary requirements for claims under Part B of EEOICPA related to lung disease; and (4) the work of industrial hygienists and staff physicians and consulting physicians of the Department of Labor and reports of such hygienists and physicians to ensure quality, objectivity, and consistency. The Advisory Board sunsets on December 19, 2019. This subcommittee is being assembled to gather and analyze data and continue working on advice under Area #3, Evidentiary Requirements for Part B lung conditions.

The Advisory Board operates in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and its implementing regulations (41 CFR part 102–3).

Agenda: The tentative agenda for the Subcommittee on Evidentiary Requirements for Part B Lung Disease meeting includes: Review data and information provided by DEEOIC program; discuss adjudication process used by claims examiners for Part B lung conditions; discuss role of Contract Medical Consultants in Part B lung conditions cases; discuss medical guidance on statutory criteria for showing lung conditions.

OWCP transcribes Advisory Board subcommittee meetings. OWCP posts the transcripts on the Advisory Board Web page, *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm*, along with written comments and other materials submitted to the subcommittee or presented at subcommittee meetings.

Public Participation, Submissions, and Access to the Public Record

Subcommittee meeting: The subcommittee will meet via teleconference on Wednesday, September 21, 2016, from 1 p.m. until 4 p.m. Eastern Time. Advisory Board subcommittee meetings are open to the public. The teleconference number and other details for listening to the meeting will be posted on the Advisory Board's Web site no later than 72 hours prior to the meeting. This information will be posted at *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm*.

Requests for special accommodations: Please submit requests for special accommodations to participate in the subcommittee meeting by email, telephone, or hard copy to Ms. Carrie Rhoads, OWCP, Room S–3524, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 343–5580; email *EnergyAdvisoryBoard@dol.gov.*

Submission of written comments for the record: You may submit written comments, identified by the subcommittee name and the meeting date of September 21, 2016, by any of the following methods:

- *Electronically:* Send to: *EnergyAdvisoryBoard@dol.gov* (specify in the email subject line, "Subcommittee on Part B Lung Conditions").
- *Mail, express delivery, hand delivery, messenger, or courier service:* Submit one copy to the following address: U.S. Department of Labor, Office of Workers' Compensation Programs, Advisory Board on Toxic Substances and Worker Health, Room S–3522, 200 Constitution Ave. NW., Washington, DC 20210. Due to security-related procedures, receipt of submissions by regular mail may experience significant delays.

Comments must be received by September 14, 2016. OWCP will make available publically, without change, any written comments, including any personal information that you provide. Therefore, OWCP cautions interested parties against submitting personal information such as Social Security numbers and birthdates.

Electronic copies of this **Federal Register** notice are available at *http://www.regulations.gov*. This notice, as well as news releases and other relevant information, are also available on the Advisory Board's Web page at *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm.*

Leonard J. Howie III,

Director, Office of Workers' Compensation Programs.

[FR Doc. 2016–20418 Filed 8–24–16; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Advisory Board on Toxic Substances and Worker Health: Subcommittee on Medical Advice, Weighing Medical Evidence; Meeting

AGENCY: Office of Workers' Compensation Programs.

ACTION: Meeting notice.

SUMMARY: Announcement of meeting of the Subcommittee on Medical Advice regarding Weighing Medical Evidence of the Advisory Board on Toxic Substances and Worker Health (Advisory Board) for the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

DATES: The subcommittee will meet via teleconference on September 13, 2016, from 1 p.m. to 3 p.m. Eastern Time.

FOR FURTHER INFORMATION CONTACT: You may contact Antonio Rios, Designated

Federal Officer, at *rios.antonio@dol.gov,* or Carrie Rhoads, Alternate Designated Federal Officer, at *rhoads.carrie@dol.gov,* U.S. Department of Labor, 200 Constitution Avenue NW., Suite S–3524, Washington, DC 20210, telephone (202) 343–5580. This is not a toll-free number.

For Press Inquiries Contact: For press inquiries: Ms. Amanda McClure, Office of Public Affairs, U.S. Department of Labor, Room S–1028, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–4672; email *mcclure.amanda.c@dol.gov.*

SUPPLEMENTARY INFORMATION: The Advisory Board is mandated by section 3687 of EEOICPA. The Secretary of Labor established the Board under this authority and Executive Order 13699 (June 26, 2015). The purpose of the Advisory Board is to advise the Secretary with respect to: (1) The Site Exposure Matrices (SEM) of the Department of Labor; (2) medical guidance for claims examiners for claims with the EEOICPA program, with respect to the weighing of the medical evidence of claimants; (3) evidentiary requirements for claims under Part B of EEOICPA related to lung disease; and (4) the work of industrial hygienists and staff physicians and consulting physicians of the Department of Labor and reports of such hygienists and physicians to ensure quality, objectivity, and consistency. The Advisory Board sunsets on December 19, 2019. This subcommittee is being assembled to gather and analyze data and continue working on advice under Area #2, Medical Advice re: Weighing Medical Evidence.

The Advisory Board operates in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and its implementing regulations (41 CFR part 102–3).

Agenda: The tentative agenda for the Subcommittee on Medical Advice re: Weighing Medical Evidence meeting includes: Review data and information provided by DEEOIC program; discuss the adjudication process used by claims examiners in weighing medical evidence; discuss claims examiner training.

OWCP transcribes Advisory Board subcommittee meetings. OWCP posts the transcripts on the Advisory Board Web page, *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm,* along with written comments and other materials submitted to the subcommittee or presented at subcommittee meetings.

Public Participation, Submissions, and Access to the Public Record

Subcommittee meeting: The subcommittee will meet via teleconference on Tuesday, September 13, 2016, from 1 p.m. to 3 p.m. Eastern Time. Advisory Board subcommittee meetings are open to the public. The teleconference number and other details for listening to the meeting will be posted on the Advisory Board's Web site no later than 72 hours prior to the meeting. This information will be posted at *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm.*

Requests for special accommodations: Please submit requests for special accommodations to participate in the subcommittee meeting by email, telephone, or hard copy to Ms. Carrie Rhoads, OWCP, Room S–3524, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 343–5580; email *EnergyAdvisoryBoard@dol.gov.*

Submission of written comments for the record: You may submit written comments, identified by the subcommittee name and the meeting date of September 13, 2016, by any of the following methods:

- *Electronically:* Send to: *EnergyAdvisoryBoard@dol.gov* (specify in the email subject line, "Subcommittee on Medical Advice re: Weighing Medical Evidence").
- *Mail, express delivery, hand delivery, messenger, or courier service:* Submit one copy to the following address: U.S. Department of Labor, Office of Workers' Compensation Programs, Advisory Board on Toxic Substances and Worker Health, Room S–3522, 200 Constitution Ave. NW., Washington, DC 20210. Due to security-related procedures, receipt of submissions by regular mail may experience significant delays.

Comments must be received by September 6, 2016. OWCP will make available publically, without change, any written comments, including any personal information that you provide. Therefore, OWCP cautions interested parties against submitting personal information such as Social Security numbers and birthdates.

Electronic copies of this **Federal Register** notice are available at *http://www.regulations.gov.* This notice, as well as news releases and other relevant information, are also available on the Advisory Board's Web page at *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm.*

Leonard J. Howie III,

Director, Office of Workers' Compensation Programs.

[FR Doc. 2016–20416 Filed 8–24–16; 8:45 am]

BILLING CODE 4510–24–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Advisory Board on Toxic Substances and Worker Health: Subcommittee on the Site Exposure Matrices (SEM); Meeting

AGENCY: Office of Workers' Compensation Programs, Labor.

ACTION: Meeting notice.

SUMMARY: Announcement of meeting of the Subcommittee on the Site Exposure Matrices of the Advisory Board on Toxic Substances and Worker Health (Advisory Board) for the Energy Employees Occupational Illness Compensation Program Act (EEOICPA).

DATES: The subcommittee will meet via teleconference on September 20, 2016, from 1 p.m. to 3 p.m. Eastern Time.

FOR FURTHER INFORMATION CONTACT: You may contact Antonio Rios, Designated Federal Officer, at *rios.antonio@dol.gov,* or Carrie Rhoads, Alternate Designated Federal Officer, at *rhoads.carrie@dol.gov,* U.S. Department of Labor, 200 Constitution Avenue NW., Suite S–3524, Washington, DC 20210, telephone (202) 343–5580. This is not a toll-free number.

For Press Inquiries Contact: For press inquiries: Ms. Amanda McClure, Office of Public Affairs, U.S. Department of Labor, Room S–1028, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–4672; email *mcclure.amanda.c@dol.gov.*

SUPPLEMENTARY INFORMATION: The Advisory Board is mandated by Section 3687 of EEOICPA. The Secretary of Labor established the Board under this authority and Executive Order 13699 (June 26, 2015). The purpose of the Advisory Board is to advise the Secretary with respect to: (1) The Site Exposure Matrices (SEM) of the Department of Labor; (2) medical guidance for claims examiners for claims with the EEOICPA program, with respect to the weighing of the medical evidence of claimants; (3) evidentiary requirements for claims under Part B of EEOICPA related to lung disease; and (4) the work of industrial hygienists and staff physicians and consulting physicians of the Department of Labor and reports of such hygienists and physicians to ensure quality, objectivity, and consistency. The Advisory Board sunsets on December 19, 2019. This subcommittee is being assembled to gather and analyze data and continue working on advice under Area #1, the Site Exposure Matrices.

The Advisory Board operates in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2) and its implementing regulations (41 CFR part 102–3).

Agenda: The tentative agenda for the Subcommittee on the Site Exposure Matrices meeting includes: Discuss Institute of Medicine report on SEM and follow-up actions taken since its issuance; discuss Occupational History Questionnaire and possible improvements; review information and data provided by the DEEOIC program related to the SEM database; discuss claims examiner training.

OWCP transcribes Advisory Board subcommittee meetings. OWCP posts the transcripts on the Advisory Board Web page, *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm,* along with written comments and other materials submitted to the subcommittee or presented at subcommittee meetings.

Public Participation, Submissions, and Access to the Public Record

Subcommittee meeting: The subcommittee will meet via teleconference on Tuesday, September 20, 2016, from 1:00 p.m. to 3:00 p.m. Eastern Time. Advisory Board subcommittee meetings are open to the public. The teleconference number and other details for listening to the meeting will be posted on the Advisory Board's Web site no later than 72 hours prior to the meeting. This information will be posted at *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm.*

Requests for special accommodations: Please submit requests for special accommodations to participate in the subcommittee meeting by email, telephone, or hard copy to Ms. Carrie Rhoads, OWCP, Room S–3524, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 343–5580; email *EnergyAdvisoryBoard@dol.gov.*

Submission of written comments for the record: You may submit written comments, identified by the subcommittee name and the meeting date of September 20, 2016, by any of the following methods:

- *Electronically:* Send to: *EnergyAdvisoryBoard@dol.gov* (specify in the email subject line, "Subcommittee on the Site Exposure Matrices").
- *Mail, express delivery, hand delivery, messenger, or courier service:* Submit one copy to the following address: U.S. Department of Labor, Office of Workers' Compensation Programs, Advisory Board on Toxic Substances and Worker Health, Room S–3522, 200 Constitution Ave. NW., Washington, DC 20210. Due to security-related procedures, receipt of submissions by regular mail may experience significant delays.

Comments must be received by September 13, 2016. OWCP will make available publically, without change, any written comments, including any personal information that you provide. Therefore, OWCP cautions interested parties against submitting personal information such as Social Security numbers and birthdates.

Electronic copies of this **Federal Register** notice are available at *http://www.regulations.gov.* This notice, as well as news releases and other relevant information, are also available on the Advisory Board's Web page at *http://www.dol.gov/owcp/energy/regs/compliance/AdvisoryBoard.htm.*

Leonard J. Howie III,

Director, Office of Workers' Compensation Programs.

[FR Doc. 2016–20419 Filed 8–24–16; 8:45 am]

BILLING CODE 4510–24–P

OFFICE OF MANAGEMENT AND BUDGET

OMB Sequestration Update Report to the President and Congress for Fiscal Year 2017

AGENCY: Executive Office of the President, Office of Management and Budget.

ACTION: Notice of availability of the OMB Sequestration Update Report to the President and Congress for FY 2017.

SUMMARY: OMB is issuing the *OMB Sequestration Update Report to the President and Congress for Fiscal Year 2017* to report on the status of the discretionary caps and on the compliance of pending discretionary appropriations legislation with those caps. For fiscal year 2016, the report finds enacted appropriations to be within the spending limits. The report also finds that 2016 supplemental funding amounts for Zika virus response included in Divisions B and D of the pending Military Construction, Veterans Affairs, and related Agencies Appropriations Act, 2017 and Zika Response and Preparedness Conference Report would not breach the 2016 limits if enacted. For fiscal year 2017, the report finds that, if the current limits remain unchanged, under OMB's estimates of actions to date by the House of Representatives for the 12 annual appropriations bills would result in a sequestration of approximately $17 million in defense programs and $775 million in non-defense programs, respectively. The report finds that actions by the Senate for both categories are in compliance with the current spending limits. Finally, the report also contains OMB's Preview Estimate of the Disaster Relief Funding Adjustment for FY 2017.

DATES: *Effective Date: August 20, 2016.* Section 254 of the Balanced Budget and Emergency Deficit Control Act of 1985 requires the Office of Management and Budget (OMB) to issue a Sequestration Update Report on August 20th of each year. With regard to this update report and to each of the three required sequestration reports, section 254(b) specifically states the following:

> SUBMISSION AND AVAILABILITY OF REPORTS.—Each report required by this section shall be submitted, in the case of CBO, to the House of Representatives, the Senate and OMB and, in the case of OMB, to the House of Representatives, the Senate, and the President on the day it is issued. On the following day a notice of the report shall be printed in the **Federal Register**.

ADDRESSES: The OMB Sequestration Reports to the President and Congress is available on-line on the OMB home page at: *http://www.whitehouse.gov/omb/legislative_reports/sequestration.*

FOR FURTHER INFORMATION CONTACT: Thomas Tobasko, 6202 New Executive Office Building, Washington, DC 20503, Email address: *ttobasko@omb.eop.gov,* telephone number: (202) 395–5745, FAX number: (202) 395–4768. Because of delays in the receipt of regular mail related to security screening, respondents are encouraged to use electronic communications.

Shaun Donovan,

Director.

[FR Doc. 2016–20323 Filed 8–24–16; 8:45 am]

BILLING CODE P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2016–046]

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when agencies no longer need them for current Government business. The records schedules authorize agencies to preserve records of continuing value in the National Archives of the United States and to destroy, after a specified period, records lacking administrative, legal, research, or other value. NARA publishes notice in the **Federal Register** for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: NARA must receive requests for copies in writing by September 26, 2016. Once NARA finishes appraising the records, we will send you a copy of the schedule you requested. We usually prepare appraisal memoranda that contain additional information concerning the records covered by a proposed schedule. You may also request these. If you do, we will also provide them once we have completed the appraisal. You have 30 days after we send to you these requested documents in which to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting Records Appraisal and Agency Assistance (ACRA) using one of the following means:

Mail: NARA (ACRA); 8601 Adelphi Road; College Park, MD 20740–6001.
Email: request.schedule@nara.gov.
FAX: 301–837–3698.

You must cite the control number, which appears in parentheses after the name of the agency that submitted the schedule, and a mailing address. If you would like an appraisal report, please include that in your request.

FOR FURTHER INFORMATION CONTACT: Margaret Hawkins, Director, by mail at Records Appraisal and Agency Assistance (ACRA); National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740–6001, by phone at 301–837–1799, or by email at *request.schedule@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year, Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing records retention periods and submit these schedules for NARA's approval. These schedules provide for timely transfer into the National Archives of historically valuable records and authorize the agency to dispose of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless otherwise specified. An item in a schedule is media neutral when an agency may apply the disposition instructions to records regardless of the medium in which it creates or maintains the records. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is expressly limited to a specific medium. (See 36 CFR 1225.12(e).)

Agencies may not destroy Federal records without Archivist of the United States' approval. The Archivist approves destruction only after thoroughly considering the records' administrative use by the agency of origin, the rights of the Government and of private people directly affected by the Government's activities, and whether or not the records have historical or other value.

In addition to identifying the Federal agencies and any subdivisions requesting disposition authority, this notice lists the organizational unit(s) accumulating the records (or notes that the schedule has agency-wide applicability when schedules cover records that may be accumulated throughout an agency); provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction); and includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it also includes information about the records. You may request additional information about the disposition process at the addresses above.

Schedules Pending

1. Department of Agriculture, Farm Service Agency (DAA–0145–2016–0008, 2 items, 2 temporary items). Background records and public comments related to **Federal Register** notices and agency rulemaking.

2. Department of Agriculture, Farm Service Agency (DAA–0145–2016–0009, 1 item, 1 temporary item). Records of payments made to farmers.

3. Department of Agriculture, Farm Service Agency (DAA–0145–2016–0010, 1 item, 1 temporary item). Records related to a defense preparedness program, including plans, correspondence, and reports.

4. Department of Defense, National Guard Bureau (DAA–0168–2016–0004, 1 item, 1 temporary item). Records regarding manpower planning and allocation including briefings, presentations, statistical reports, and related records.

5. Department of Health and Human Services, Office of the Secretary (DAA–0468–2016–0001, 5 items, 5 temporary items). Records of the Office of Public Affairs to include intranet and Web site records relating to content, management, and support.

6. Department of Health and Human Services, Office of the Secretary (DAA–0468–2016–0002, 8 items, 3 temporary items). Records of the Office of the Inspector General including routine correspondence, regulation support records, and working papers. Proposed for permanent retention are policy records, press releases, and Congressional correspondence, testimonies, and mandated reports.

7. Department of Homeland Security, United States Citizenship and Immigration Services (DAA–0566–2016–0015, 6 items, 6 temporary items). Master files of an electronic information system used to track applications for employment-based specialty occupation visas rejected because they were received after the quota for that visa category was reached.

8. Department of Veterans Affairs, Veterans Benefits Administration (DAA–0015–2016–0008, 2 items, 2 temporary items). Records related to approving and monitoring homeless shelter providers including applications and performance files.

9. Department of Veterans Affairs, Veterans Health Administration (DAA–0015–2016–0005, 1 item, 1 temporary item). Records relating to projected health care cost and utilization including statistical studies, analyses, and summary reports.

10. Architectural and Transportation Barriers Compliance Board, Agency-

wide (DAA–0588–2016–0001, 4 items, 2 temporary items). Email relating to temporary program and administrative functions and to non-substantive rulemaking activities. Proposed for permanent retention is email relating to program management and committee activity functions.

11. National Archives and Records Administration, Government-wide (DAA–GRS–2016–0008, 1 item, 1 temporary item). General Records Schedule for records that agencies are required by statute to publish online for public access, such as as online Freedom of Information Act libraries.

12. National Archives and Records Administration, Government-wide (DAA–GRS–2016–0011, 17 items, 16 temporary items). General Records Schedule for records of maintenance and service of facilities, equipment, vehicles, property, and supplies. Proposed for permanent retention are maintenance manuals of unique or customized aircraft.

13. National Archives and Records Administration, Government-wide (DAA–GRS–2016–0012, 4 items, 4 temporary items). General Records Schedule for records produced in managing mail, printing, and telecommunication services.

14. National Archives and Records Administration, Government-wide (DAA–GRS–2016–0013, 3 items, 3 temporary items). General Records Schedule for records on the routine day-to-day administration of the financial management and reporting, technology management, and information access and protection functions.

Laurence Brewer,

Chief Records Officer for the U.S. Government.

[FR Doc. 2016–20355 Filed 8–24–16; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request

AGENCY: National Science Foundation.

ACTION: Submission for OMB review; comment request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13.

This is the second notice for public comment; the first was published in the **Federal Register** at 81 FR 33274, and no comments were received. NSF is forwarding the proposed renewal submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice. The full submission may be found at: *http://www.reginfo.gov/public/do/PRAMain.* Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725 17th Street NW., Room 10235, Washington, DC 20503, and to Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 1265, Arlington, Virginia 22230 or send email to *splimpto@nsf.gov.* Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling 703–292–7556.

FOR FURTHER INFORMATION CONTACT: Suzanne Plimpton on (703) 292–7556 or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including federal holidays).

NSF may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number. Under OMB regulations, NSF may continue to conduct or sponsor the collection of information while this submission is pending at OMB.

SUPPLEMENTARY INFORMATION:

Title: Antarctic Conservation Act Application and Permit Form.

OMB Control Number: 3145–0034.

Proposed Project: The current Antarctic Conservation Act Application Permit Form (NSF 1078) has been in use for several years. The form requests general information, such as name, affiliation, location, etc., and more specific information as to the type of object to be taken (plant, native mammal, or native bird.

Use of the Information: The purpose of the regulations (45 CFR 670) is to conserve and protect the native mammals, birds, plants, and invertebrates of Antarctica and the ecosystem upon which they depend and to implement the Antarctic Conservation Act of 1978, Public Law 95–541, as amended by the Antarctic Science, Tourism, and Conservation Act of 1996, Public Law 104–227.

Burden on the Public: The Foundation estimates about 25 responses annually at 45 minutes per response; this computes to approximately 11.25 hours annually.

Dated: August 19, 2016.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2016–20359 Filed 8–24–16; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Comment Request

AGENCY: National Science Foundation.

ACTION: Submission for OMB review; comment request.

SUMMARY: The National Science Foundation (NSF) has submitted the following information collection requirement to OMB for review and clearance under the Paperwork Reduction Act of 1995, Pub. L. 104–13. This is the second notice for public comment; the first was published in the **Federal Register** at 81 FR 40353, and no comments were received. NSF is forwarding the proposed submission to the Office of Management and Budget (OMB) for clearance simultaneously with the publication of this second notice. The full submission (including comments) may be found at: *http://www.reginfo.gov/public/do/PRAMain.*

COMMENTS: Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions f the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725—17th Street NW., Room 10235, Washington, DC 20503, and to Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Boulevard, Suite 1265, Arlington, Virginia 22230 or send email to *splimpto@nsf.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including federal holidays).

DATES: Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling 703–292–7556.

NSF may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

SUPPLEMENTARY INFORMATION:

Title of Collection: Grantee Reporting Requirements for Partnerships for Research and Education in Materials (PREM).

OMB Number: 3145–0232.

Type of Request: Intent to seek approval to renew an information collection.

Overview of This Information Collection: NSF has standing authority to support activities to improve the participation of women and minorities in science and engineering under the Science and Engineering Equal Opportunities Act (Public Law 96–516), and authority to collect data on those issues.

The Partnerships for Research and Education in Materials (PREM) aims to enhance diversity in materials research and education by stimulating the development of formal, long-term, collaborative research and education relationships between minority-serving colleges and universities and centers, institutes and facilities supported by the NSF Division of Materials Research (DMR). With this collaborative model PREMs build intellectual and physical infrastructure within and between disciplines, weaving together knowledge creation, knowledge integration, and knowledge transfer. PREMs conduct world-class research through partnerships of academic institutions, national laboratories, industrial organizations, and/or other public/private entities. New knowledge thus created is meaningfully linked to society, with an emphasis on enhancing diversity.

PREMs enable and foster excellent education, integrate research and education, and create bonds between learning and inquiry so that discovery and creativity more fully support the learning process. PREMs capitalize on diversity through participation and collaboration in center activities and demonstrate leadership in the involvement of groups underrepresented in science and engineering.

PREMs will be required to submit annual reports on progress and plans, which will be used as a basis for performance review and determining the level of continued funding. To support this review and the management of the award PREMs will be required to develop a set of management and performance indicators for submission annually to NSF via the Research Performance Project Reporting module in Research.gov and an external technical assistance contractor that collects programmatic data electronically. These indicators are both quantitative and descriptive and may include, for example, the characteristics of personnel and students; sources of financial support and in-kind support; expenditures by operational component; research activities; education activities; patents, licenses; publications; degrees granted to students involved in PREM activities; descriptions of significant advances and other outcomes of the PREM effort.

Each PREM's annual report will address the following categories of activities: (1) Research, (2) education, (3) knowledge transfer, (4) partnerships, (5) diversity, (6) management, and (7) budget issues.

For each of the categories the report will describe overall objectives for the year, problems the PREM has encountered in making progress towards goals, anticipated problems in the following year, and specific outputs and outcomes.

PREMs are required to file a final report through the RPPR and external technical assistance contractor. Final reports contain similar information and metrics as annual reports, but are retrospective.

Use of the Information: NSF will use the information to continue funding of PREMs, and to evaluate the progress of the program.

Estimate of Burden: 34 hours per PREM for 12 PREMs for a total of 408 hours.

Respondents: Non-profit institutions.

Estimated Number of Responses per Report: One from each of the twelve PREMs.

Dated: August 22, 2016.

Suzanne H. Plimpton,

Reports Clearance Officer, National Science Foundation.

[FR Doc. 2016–20367 Filed 8–24–16; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 52–027 and 52–028; NRC–2008–0441]

South Carolina Electric & Gas Company and South Carolina Public Service Authority; Virgil C. Summer Nuclear Station, Units 2 and 3; Piping Line Number Additions, Deletions and Functional Capability Re-Designation

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemption and combined license amendment; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is granting an exemption to allow a departure from the certification information of Tier 1 of the generic design control document (DCD) and is issuing License Amendment No. 39 to Combined Licenses (COL), NPF–93 and NPF–94. The COLs were issued to South Carolina Electric & Gas Company (SCE&G), and South Carolina Public Service Authority (the licensee) in March 2012, for the construction and operation of the Virgil C. Summer Nuclear Station (VCSNS), Units 2 and 3, located in Fairfield County, South Carolina.

The granting of the exemption allows the changes to Tier 1 information requested in the amendment. Because the acceptability of the exemption was determined in part by the acceptability of the amendment, the exemption and amendment are being issued concurrently.

DATES: The exemption and amendment were issued on January 20, 2016.

ADDRESSES: Please refer to Docket ID NRC–2008–0441 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2008–0441. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select "ADAMS Public Documents" and then select "*Begin Web-based ADAMS Search.*" For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that a document is referenced.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. Specific information on NRC's PDR is available at *http://www.nrc.gov/reading-rm/pdr.html.*

FOR FURTHER INFORMATION CONTACT: Ruth C. Reyes, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–3249; email: *Ruth.Reyes@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

In a letter dated December 18, 2014, the licensee requested a license amendment and exemption (ADAMS Accession No. ML14353A107), and supplemented this request by letters dated June 29 and October 16, 2015 (ADAMS Accession Nos. ML15180A248 and ML15292A075, respectively). The NRC is granting an exemption from Tier 1 information in the certified DCD incorporated by reference in part 52 of title 10 of the *Code of Federal Regulations* (10 CFR), appendix D, "Design Certification Rule for the AP1000 Design," and issuing License Amendment No. 39 to COLs, NPF–93 and NPF–94, to the licensee. The exemption is required by Paragraph A.4 of Section VIII, "Processes for Changes and Departures," appendix D to 10 CFR part 52 to allow the licensee to depart from Tier 1 information. With the requested amendment, the licensee sought to add or delete line numbers of existing piping lines, as well as update the functional capability classification of existing process flow lines, to provide consistency with the Updated Final Safety Analysis Report Tier 2 information.

Part of the justification for granting the exemption was provided by the review of the amendment. Because the exemption is necessary in order to issue the requested license amendment, the NRC granted the exemption and issued the amendment concurrently, rather than in sequence. This included issuing a combined safety evaluation containing the NRC staff's review of both the exemption request and the license amendment. The exemption met all applicable regulatory criteria set forth in 10 CFR 50.12, 10 CFR 52.7, and Section VIII.A.4 of appendix D to 10 CFR part 52. The license amendment was found to be acceptable as well. The combined safety evaluation is available in ADAMS under Accession No. ML15336A872.

Identical exemption documents (except for referenced unit numbers and license numbers) were issued to the licensee for VCSNS Units 2 and 3 (COLs NPF–93 and NPF–94). These documents can be found in ADAMS under Accession Nos. ML15336A867 and ML15336A866, respectively. The exemption is reproduced (with the exception of abbreviated titles and additional citations) in Section II of this document. The amendment documents for COLs NPF–93 and NPF–94 are available in ADAMS under Accession Nos. ML15336A869 and ML15336A868, respectively. A summary of the amendment documents is provided in Section III of this document.

II. Exemption

Reproduced below is the exemption document issued to VCSNS, Units 2 and 3. It makes reference to the combined safety evaluation that provides the reasoning for the findings made by the NRC (and listed under Item 1) in order to grant the exemption:

1. In a letter dated December 18, 2014, and as supplemented by letters dated June 29 and October 16, 2015, the licensee requested from the NRC an exemption to allow departures from Tier 1 information in the certified DCD incorporated by reference in 10 CFR part 52, appendix D as part of license amendment request 13–28, "Piping Line Number Additions, Deletions and Functional Capability Re Designation."

For the reasons set forth in Section 3.1 of the NRC staff's Safety Evaluation that supports this license amendment, which can be found at ADAMS Accession No. ML15336A872, the Commission finds that:

A. The exemption is authorized by law;

B. The exemption presents no undue risk to public health and safety;

C. The exemption is consistent with the common defense and security;

D. Special circumstances are present in that the application of the rule in this circumstance is not necessary to serve the underlying purpose of the rule;

E. The special circumstances outweigh any decrease in safety that may result from the reduction in standardization caused by the exemption, and

F. The exemption will not result in a significant decrease in the level of safety otherwise provided by the design.

2. Accordingly, the licensee is granted an exemption to the provisions of 10 CFR part 52, appendix D, Section III.B, to allow deviations from the certified DCD Tier 1 Tables 2.1.2–2, 2.2.1–2, 2.2.2–2, 2.2.3–2, 2.3.6–2, 2.3.7–2, and 2.7.1–2, as described in the licensee's request dated December 18, 2014, and as supplemented by letters dated June 29 and October 16, 2015. This exemption is related to, and necessary for, the granting of License Amendment No. 39, which is being issued concurrently with this exemption.

3. As explained in Section 5 of the NRC staff's Safety Evaluation that supports this license amendment (ADAMS Accession No. ML15336A872), this exemption meets the eligibility criteria for categorical exclusion set forth in 10 CFR 51.22(c)(9). Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment needs to be prepared in connection with the issuance of the exemption.

4. This exemption is effective as of the date of its issuance.

III. License Amendment Request

The request for the amendment and exemption was submitted by the letter dated December 18, 2014. The licensee supplemented this request by the letters dated June 29 and October 16, 2015. The proposed amendment is described in Section I, of this **Federal Register** notice.

The Commission has determined that the amendment requested by the licensee complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or combined license, as applicable, proposed no significant hazards consideration determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** on April 28, 2015 (80 FR 23606). The June 29 and October 16, 2015, supplements had no effect on the no significant hazards consideration determination, and no comments were received during the 30-day comment period.

The Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments.

IV. Conclusion

Using the reasons set forth in the combined safety evaluation, the staff granted the exemption and issued the amendment that the licensee requested on December 18, 2014, and supplemented by the letters dated June 29 and October 16, 2015. The exemption and amendment were issued on January 20, 2016, as part of a combined package to the licensee (ADAMS Accession No. ML15336A862).

Dated at Rockville, Maryland, this 16th day of August 2016.

For the Nuclear Regulatory Commission.

Jennifer Dixon-Herrity,

Acting Chief, Licensing Branch 4, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2016–20393 Filed 8–24–16; 8:45 am]

BILLING CODE 7590–01–P

POSTAL SERVICE

Privacy Act of 1974; System of Records

AGENCY: Postal Service®.

ACTION: Notice of establishment of new system of records.

SUMMARY: The United States Postal Service® (Postal Service) is proposing to establish a new Customer Privacy Act System of Records (SOR) to support the Informed Delivery™ notification service.

DATES: This system will become effective without further notice on September 26, 2016 unless, in response to comments received on or before that date, the Postal Service makes any substantive change to the purpose or routine uses set forth, or to expand the availability of information in this system, as described in this notice. If the Postal Service determines that certain portions of this SOR should not be implemented, or that implementation of certain portions should be postponed in light of comments received, the Postal Service may choose to implement the remaining portions of the SOR on the stated effective date, and will provide notice of that action.

ADDRESSES: Comments may be mailed or delivered to the Privacy and Records Office, United States Postal Service, 475 L'Enfant Plaza SW., Room 1P830, Washington, DC 20260–0004. Copies of all written comments will be available at this address for public inspection and photocopying between 8 a.m. and 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Janine Castorina, Chief Privacy Officer/A, Privacy and Records Office, 202–268–3089 or *privacy@usps.gov.*

SUPPLEMENTARY INFORMATION: This notice is in accordance with the Privacy Act requirement that agencies publish their systems of records in the **Federal Register** when there is a revision, change, or addition, or when the agency establishes a new system of records. The Postal Service is establishing a new system of records to support an expansion of its Informed Delivery™ notification service.

I. Background

Informed Delivery™ is a digital service that allows enrolled users to receive an email notification that contains grayscale images of the outside of their letter-sized mailpieces processed by USPS automation equipment prior to delivery. This service is offered at no cost to the consumer. Informed Delivery™ is currently available in areas of New York, Connecticut, and Northern Virginia (NoVa). The Postal Service intends to expand this service to the Capital Region (Washington, DC, Baltimore, and Richmond) in September 2016, with national expansion planned for 2017. The establishment of this new USPS Privacy Act System of Records is intended to support this expansion.

II. Rationale for Changes to USPS Privacy Act Systems of Records

Expansion and User Acquisition Strategy

Informed Delivery™ is making mail a more valuable and effective communication channel for consumers, increasing the relevancy of physical mail in today's highly digital environment. Informed Delivery™ offers residential customers the convenience of knowing what is in their mailbox from anywhere, even while traveling. Providing advance notice of mail delivery also allows consumers to take action before important pieces reach their mailbox, revolutionizing the customer experience with mail. In some cases, email notifications with mailpiece images will include interactive content, such as "ride-along" images or related links from the business mailer. Lastly, users will have access to an online dashboard, which will display their mailpiece images from the previous six days.

Currently, there are over 75,000 Informed Delivery™ users in areas of Northern Virginia, New York, and Connecticut. According to USPS data, 90 percent of users surveyed in Northern Virginia have said they would recommend Informed Delivery™ to friends or family, and 97 percent of those surveyed in New York would likely continue using the service. In light of the positive feedback that the Postal Service has received from Informed Delivery™ users, the Postal Service intends to expand the Informed Delivery™ notification service to the Washington, DC, Baltimore, and Richmond metropolitan areas in September 2016, with national expansion planned for 2017. To achieve this goal, the Postal Service has developed a comprehensive user acquisition strategy that includes a direct mail referral campaign, email campaigns sent to My USPS and USPS.com users, and promotion at retail locations. For the referral campaign, USPS will send a mailpiece to current Informed Delivery™ users with the request that they send the provided tear-off cards to friends and family who may be interested in the service. As part of the user acquisition strategy, the Postal Service will be collecting personal information from internal and external sources, as identified below.

Informed Delivery™ is currently supported by two Privacy Act Systems of Records, USPS 810.100, *www.usps.com* Registration and USPS 820.200, Mail Management and Tracking Activity. The Postal Service has determined that a new system of records should be established to support the planned expansion of the service and to promote transparency with regard to its collection and use of customer information.

Purposes and Disclosures

USPS is using customer information to link physical mail with digital content in order to provide consumers with a convenient, innovative, and relevant way to access their mailpieces. Specifically, customer information will be used to support the Informed Delivery™ notification service, providing users with a daily email notification containing images of their letter-sized mailpieces that will be arriving in their mailbox soon. Additionally, this information will help USPS maintain up-to-date user records and prevent fraudulent transactions, resulting in an improved customer experience. USPS will also collect data analytics from mail campaigns sent through Informed Delivery™ in order to determine the outcomes of each campaign and help guide business decisions.

Security and Privacy

The Postal Service takes the privacy of customers' mail very seriously and takes measures to ensure that all personal information is protected. To obtain the mail images, the Postal Service relies on existing automated mail processing equipment that is used every day to sort mail so that it can be delivered to the proper address. The scanned images that the Postal Service sends to enrolled users show only the exterior, front-side of letter-sized mail; the daily notification does not contain any information about the contents of the scanned mailpieces. The sanctity of the mail is also protected by the U.S. Postal Inspection Service.

To enroll in Informed Delivery™, consumers must live in a ZIP Code where the service is active and have an eligible address, which can be confirmed through the Informed Delivery™ Web site. Eligible consumers must then successfully complete one of several available verification processes. Once these steps are complete, a consumer will be able to access the Informed Delivery™ notification service. During the sign-up and verification process, a consumer's household address is only collected and maintained to ensure that he or she only receives images of mail intended for delivery at the verified address. Other methods to ensure the security of the data are described below in the Safeguards section of the new Informed Delivery™ SOR.

III. Description of the New System of Records

Pursuant to 5 U.S.C. 552a(e)(11), interested persons are invited to submit written data, views, or arguments on this proposal. A report of the establishment of this SOR has been sent to Congress and to the Office of Management and Budget for their evaluations. The Postal Service does not expect the establishment of this SOR to have any adverse effect on individual privacy rights. Accordingly, for the reasons stated above, the Postal Service proposes a new system of records as follows:

USPS 820.300

SYSTEM NAME:

Informed Delivery™.

SYSTEM LOCATION:

USPS Headquarters; Wilkes-Barre Solutions Center; and Eagan, MN.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

1. Customers who are enrolled in Informed Delivery™ notification service.
2. Mailers that use Informed Delivery™ notification service to enhance the value of the physical mail sent to customers.

CATEGORIES OF RECORDS IN THE SYSTEM:

1. *Customer information:* Name; customer ID(s); mailing (physical) address(es) and corresponding 11-digit delivery point ZIP Code; phone number(s); email address(es); text message number(s) and carrier.
2. *Customer account preferences:* Individual customer preferences related to email and online communication participation level for USPS and marketing information.
3. *Customer feedback:* Information submitted by customers related to Informed Delivery™ notification service or any other Postal product or service.
4. *Subscription information:* Date of customer sign-up for services through an opt-in process; date customer opts-out of services; nature of service provided.
5. *Data on mailpieces:* Destination address of mailpiece; Intelligent Mail barcode (IMb); 11-digit delivery point ZIP Code; and delivery status; identification number assigned to equipment used to process mailpiece.
6. *Mail Images:* Electronic files containing images of mail pieces captured during normal mail processing operations.
7. *User Data associated with 11-digit ZIP Codes:* Information related to the user's interaction with Informed Delivery™ email messages, including, but not limited to email open and click-through rates, dates, times, and open rates appended to mailpiece images (user data is not associated with personally identifiable information).
8. *Data on Mailings:* Intelligent Mail barcode (IMb) and its components including the Mailer Identifier (Mailer ID or MID), Service Type Identifier (STID) and Serial Number.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

39 U.S.C. 401, 403, and 404.

PURPOSE(S):

1. To support the Informed Delivery™ notification service which provides customers with electronic notification of physical mail that is intended for delivery at the customer's address.
2. To provide daily email communication to consumers with images of the letter-sized mailpieces that they can expect to be delivered to their mailbox each day.
3. To provide an enhanced customer experience and convenience for mail delivery services by linking physical mail to electronic content.
4. To obtain and maintain current and up-to-date address and other contact information to assure accurate and reliable delivery and fulfillment of postal products, services, and other material.
5. To determine the outcomes of marketing or advertising campaigns and to guide policy and business decisions through the use of analytics.
6. To identify, prevent, or mitigate the effects of fraudulent transactions.
7. To demonstrate the value of Informed Delivery™ in enhancing the responsiveness to physical mail and to promote use of the mail by commercial mailers and other postal customers.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES

Standard routine uses 1–7, 10 and 11 apply.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM

STORAGE

Automated database and computer storage media.

RETRIEVABILITY

By customer email address, 11-Digit ZIP Code and/or the Mailer ID component of the Intelligent Mail Barcode.

SAFEGUARDS

Computers and computer storage media are located in controlled-access areas under supervision of program personnel. Access to these areas is limited to authorized personnel, who must be identified with a badge. Access to records is limited to individuals whose official duties require such access. Contractors and licensees are subject to contract controls and unannounced on-site audits and inspections. Computers are protected by mechanical locks, card key systems, or other physical access control methods. The use of computer systems is regulated with installed security software, computer logon identifications, and operating system controls including access controls, terminal and transaction logging, and file management software. Online data transmissions are protected by encryption. Access is controlled by logon ID and password. Online data transmissions are protected by encryption.

RETENTION AND DISPOSAL

Mailpiece images will be retained up to 7 days (mailpiece images are not associated with personally identifiable information). Records stored in the subscription database are retained until the customer cancels or opts-out of the service.

User data is retained for 2 years, 11 months.

Records existing on computer storage media are destroyed according to the applicable USPS media sanitization practice. Any records existing on paper will be destroyed by burning, pulping, or shredding.

SYSTEM MANAGER(S) AND ADDRESS

Vice President, New Products and Innovation, United States Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260

NOTIFICATION PROCEDURE

Customers wanting to know if information about them is maintained in this system of records must address inquiries in writing to the system manager. Inquiries must contain name, address, email and other identifying information.

RECORD ACCESS PROCEDURES

Requests for access must be made in accordance with the Notification Procedure above and USPS Privacy Act regulations regarding access to records and verification of identity under 39 CFR 266.6.

CONTESTING RECORD PROCEDURES

See Notification Procedure and Record Access Procedures above.

RECORD SOURCE CATEGORIES

Individual customers who request Informed Delivery™ notification service; USPS.com account holders; other USPS systems and applications including those that support online change of address, mail hold services, Premium Forwarding Service or PO Boxes Online; commercial entities, including commercial mailers or other Postal Service business partners and third-party mailing list providers.

* * * * *

Stanley F. Mires,

Attorney, Federal Compliance.

[FR Doc. 2016–20189 Filed 8–24–16; 8:45 am]

BILLING CODE 7710–12–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2016–0022]

Modifications to the Disability Determination Procedures; Extension of Testing of Some Disability Redesign Features

AGENCY: Social Security Administration.

ACTION: Notice of the extension of tests involving modifications to the disability determination procedures.

SUMMARY: We are announcing the extension of tests involving modifications to disability determination procedures authorized by 20 CFR 404.906 and 416.1406. These rules authorize us to test several modifications to the disability determination procedures for adjudicating claims for disability insurance benefits under title II of the Social Security Act (Act) and for supplemental security income payments based on disability under title XVI of the Act. This notice is our last extension of the "single decisionmaker" test, as we will phase out the test until elimination in 2018. This notice also extends the separate "prototype" test.

DATES: We are extending our selection of cases to be included in these tests from September 23, 2016 until no later than December 28, 2018. At that time, we will publish another notice in the **Federal Register** to confirm our elimination of the "single decisionmaker" test.

FOR FURTHER INFORMATION CONTACT: Kenneth Williams, Office of Disability Policy, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235–6401, (410) 965–0608, for information about this notice. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online, at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION: Our current rules authorize us to test, individually or in any combination, certain modifications to the disability determination procedures. 20 CFR 404.906 and 416.1406. We conducted several tests under the authority of these rules. In the "single decisionmaker" test, a disability examiner may make the initial disability determination in most cases without obtaining the signature of a medical or psychological consultant. Currently, 19 states and the territory of Guam use the single decisionmaker test. There are 9 states and the territory of Guam that use single decisionmaker as a stand-alone test. The remaining 10 states use single decisionmaker in combination with a separate test that we refer to as "prototype." Under section 832 of the Bipartisan Budget Act of 2015 (BBA),[1] we are required to end the single decisionmaker test. Therefore, this extension of the single decisionmaker test will provide us the time necessary to take all of the administrative actions needed to reinstate uniform use of medical and psychological consultants.

Prototype is a separate test, which we conduct in 10 States. 64 FR 47218. Currently, the prototype combines the single decisionmaker approach described above with the elimination of the reconsideration level of our administrative review process. We will continue to make decisions in these 10 States by maintaining the elimination of the reconsideration level, except that we will comply with the requirements of the BBA by reinstating the use of medical consultants over the course of this extension in those States with the prototype tests. We will notify the public of the progression of our plan through additional notices in the **Federal Register**.

We extended the period for selecting claims for these tests several times. Most recently, we extended the period from September 25, 2015 to September 23, 2016. 80 FR 47553. We are extending case selection for prototype and single decision maker tests until December 28, 2018. After this date, we will publish another notice in the **Federal Register** to confirm our elimination of the single decisionmaker test.

Virginia Reno,

Deputy Commissioner for Retirement and Disability Policy.

[FR Doc. 2016–20253 Filed 8–24–16; 8:45 am]

BILLING CODE 4191–02–P

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[1] Public Law 114–74, 129 Stat. 584, 613.

STATE DEPARTMENT

[Public Notice: 9687]

Foreign Affairs Policy Board Meeting Notice; Closed Meeting

In accordance with the Federal Advisory Committee Act, 5 U.S.C. App., the Department of State announces a meeting of the Foreign Affairs Policy Board to take place on September 13, 2016, at the Department of State, Washington, DC.

The Foreign Affairs Policy Board reviews and assesses: (1) Global threats and opportunities; (2) trends that implicate core national security interests; (3) tools and capacities of the civilian foreign affairs agencies; and (4) priorities and strategic frameworks for U.S. foreign policy. Pursuant to section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App 10(d), and 5 U.S.C. 552b(c)(1), it has been determined that this meeting will be closed to the public as the Board will be reviewing and discussing matters properly classified in accordance with Executive Order 13526.

For more information, contact Adam Lusin at (202) 736–7308.

Dated: August 15, 2016.

Adam Lusin,

Designated Federal Officer.

[FR Doc. 2016–20410 Filed 8–24–16; 8:45 am]

BILLING CODE 4710–10–P

TENNESSEE VALLEY AUTHORITY

Meeting of the Regional Resource Stewardship Council

AGENCY: Tennessee Valley Authority (TVA).

ACTION: Notice of meeting.

SUMMARY: The TVA Regional Resource Stewardship Council (RRSC) will hold a meeting on Tuesday, September 20, and Wednesday, September 21, 2016, to consider various matters.

The RRSC was established to advise TVA on its natural resource stewardship activities. Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2.

The meeting agenda includes the following:

1. Introductions
2. Updates on Natural Resources and River Management Issues
3. Presentations regarding TVA's Comprehensive Land Planning Process and Seven States Water Partnership
4. Public Comments
5. Council Discussion

The RRSC will hear opinions and views of citizens by providing a public comment session starting at 9:00 a.m. EDT, on Wednesday, September 21, TVA will provide time limits for public comment once registered. Persons wishing to speak are requested to register at the door by 8:00 a.m., EDT, on Wednesday, September 21, and will be called on during the public comment period. Handout materials should be limited to one printed page. Written comments are also invited and may be mailed to the Regional Resource Stewardship Council, Tennessee Valley Authority, 400 West Summit Hill Drive, WT–9 D, Knoxville, Tennessee 37902.

DATES: The public meeting will be held on Tuesday, September 20, from 8:30 a.m. to 11:30 a.m., EDT, and Wednesday, September 21, from 8:00 a.m. to 11:45 a.m., EDT.

ADDRESSES: The meeting will be held at the Holiday Inn World's Fair Park, 525 Henley Street, Knoxville, TN 37902, and will be open to the public. Anyone needing special access or accommodations should let the contact below know at least a week in advance.

FOR FURTHER INFORMATION CONTACT: Barbie Perdue, 400 West Summit Hill Drive, WT–9 D, Knoxville, Tennessee 37902, (865) 632–6113.

Dated: August 17, 2016.

Joseph J. Hoagland,

Vice President, Enterprise Relations & Innovation, Tennessee Valley Authority.

[FR Doc. 2016–20379 Filed 8–24–16; 8:45 am]

BILLING CODE 8120–08–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket No. USTR–2016–2013]

2016 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Comments

AGENCY: Office of the United States Trade Representative.

ACTION: Request for comments.

SUMMARY: The Office of the United States Trade Representative (USTR) requests written comments identifying Internet and physical markets based outside the United States that should be included in the 2016 Notorious Markets List (List). In 2010, USTR began publishing the Notorious Markets List separately from the annual Special 301 Report as an "Out-of-Cycle Review." The List identifies online and physical marketplaces that reportedly engage in and facilitate substantial copyright piracy and trademark counterfeiting.

DATES: Written comments are due by 11:59 p.m. (EDT) on October 7, 2016. Rebuttal or other information to be considered during the review is due by 11:59 p.m. (EDT) on October 21, 2016.

ADDRESSES: You should submit written comments through the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments in section II below. For alternatives to on-line submissions, please contact USTR at *Special301@ustr.eop.gov* before transmitting a comment and in advance of the relevant deadline.

FOR FURTHER INFORMATION CONTACT: Christine Peterson, Director for Intellectual Property and Innovation, Office of the United States Trade Representative, at *special301@ustr.eop.gov.* You can find information about the Special 301 Review, including the Notorious Markets List, at *www.ustr.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The United States is concerned with trademark counterfeiting and copyright piracy on a commercial scale because they cause significant financial losses for rights holders, legitimate businesses and governments, undermine critical U.S. comparative advantages in innovation and creativity to the detriment of American workers, and potentially pose significant risks to consumer health and safety as well as privacy and security. The Notorious Markets List identifies select online and physical marketplaces that reportedly engage in or facilitate substantial copyright piracy and trademark counterfeiting.

Beginning in 2006, USTR identified notorious markets in the annual Special 301 Report. In 2010, pursuant to the Administration's 2010 Joint Strategic Plan on Intellectual Property Enforcement, USTR announced that it would begin publishing the List as an Out-of-Cycle Review, separately from the annual Special 301 Report. USTR published the first List in February 2011. USTR develops the annual List based upon public comments solicited through the **Federal Register** and in consultation with other Federal agencies that serve on the Special 301 Subcommittee of the Trade Policy Staff Committee.

The United States encourages owners and operators of markets reportedly involved in piracy and counterfeiting to adopt business models that rely on the licensed distribution of legitimate content and products and to work with rights holders and enforcement officials to address infringement. USTR also encourages responsible government authorities to intensify their efforts to investigate reports of piracy and counterfeiting in such markets, and to pursue appropriate enforcement actions. The List does not purport to reflect findings of legal violations, nor does it reflect the United States Government's analysis of the general intellectual property rights (IPR) protection and enforcement climate in the country or countries concerned. For an analysis of the IPR climate in particular countries, please refer to the annual Special 301 Report, published each spring no later than 30 days after USTR submits the National Trade Estimate to Congress.

II. Public Comments

A. Content of Comments

USTR invites written comments concerning examples of Internet and physical notorious markets, including foreign trade zones that allegedly facilitate substantial trademark counterfeiting and copyright piracy.

To receive full consideration, written comments should be as detailed as possible. Comments must clearly identify the market and the reasons why the commenter believes that the market should be included in the List. Commenters should include the following information, as applicable:

- If a physical market, the market's name and location, *e.g.,* common name, street address, neighborhood, shopping district, city, etc., and the identity of the principal owners/operators.
- if an online market:
  - ○ The domain name(s) past and present, available registration information, and name(s) and location(s) of the hosting provider(s) and operator(s).
  - ○ information on the volume of Internet traffic associated with the Web site, including number of visitors and page views, average time spent on the site, estimate of the number of infringing goods offered, sold or traded and number of infringing files streamed, shared, seeded, leeched, downloaded, uploaded or otherwise distributed or reproduced, and global or country popularity rating (*e.g.,* Alexa rank).
  - ○ revenue sources such as sales, subscriptions, donations, upload incentives, or advertising and the methods by which that revenue is collected.
- whether the market is owned, operated or otherwise affiliated with a government entity.
- types of counterfeit or pirated products or services sold, traded, distributed or otherwise made available at that market.
- volume of counterfeit or pirated goods or services or other indicia of a market's scale, reach or relative significance in a given geographic area or with respect to a category of goods or services.
- estimates of economic harm to the rights holder resulting from the piracy or counterfeiting and a description of the methodology used to calculate the harm.
- whether the infringing goods or services sold, traded, distributed or made available pose a risk to public health or safety.
- any known contractual, civil, administrative or criminal enforcement activity against the market and the outcome of that enforcement activity.
- additional actions taken by the market owners or operators to remove, limit or discourage the availability of counterfeit or pirated goods or services, including policies to prevent or remove access to such goods or services, or to disable seller or user accounts; the effectiveness of market policies and guidelines in addressing counterfeiting and piracy; and the level of cooperation with right holders and law enforcement.
- any additional information relevant to the review.

B. Instructions for Submitting Comments

Comments must be in English. To ensure the timely receipt and consideration of comments, USTR strongly encourages commenters to submit comments electronically, using the *www.regulations.gov* Web site. To submit comments via *www.regulations.gov,* enter Docket Number USTR–2016–2013 on the home page and click "Search." The site will provide a search-results page listing all documents associated with this docket. Find the reference to this notice and click on the button labeled "Comment Now!" For further information on using the *www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on "How to Use Regulations.gov" on the bottom of the home page.

The *www.regulations.gov* Web site allows users to provide comments by filling in a "Comment" field, or by attaching a document using an "Upload File" field. USTR prefers that comments be provided as an attached document. If a document is attached, please type "2016 Out-of-Cycle Review of Notorious Markets" in the "Comment" field. USTR prefers submissions in Microsoft Word (.doc) or Adobe Acrobat (.pdf) format. If the submission is in another file format, please indicate the name of the software application in the "Comment" field. File names should reflect the name of the person or entity submitting the comments. Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter in the comments themselves. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file as the comment itself, rather than submitting them as separate files.

For any comments submitted that contains business confidential information, the file name of the business confidential version should begin with the characters "BC". Any page containing business confidential information must be clearly marked "BUSINESS CONFIDENTIAL" on the top of that page and the submission should clearly indicate, via brackets, highlighting, or other means, the specific information that is business confidential. A filer requesting business confidential treatment must certify that the information is business confidential and would not customarily be released to the public by the submitter. Additionally, the submitter should type "Business Confidential 2016 Out-of-Cycle Review of Notorious Markets" in the "Comment" field.

Filers of comments containing business confidential information also must submit a public version of their comments. The file name of the public version should begin with the character "P". The "BC" and "P" should be followed by the name of the person or entity submitting the comments. Filers submitting comments containing no business confidential information should name their file using the name of the person or entity submitting the comments. The non-business confidential version will be placed in the docket at *www.regulations.gov* and be available for public inspection.

As noted, USTR strongly urges commenters to submit comments through *www.regulations.gov.* Any alternative arrangements must be made before transmitting a comment and in advance of the relevant deadline by contacting USTR at *Special301@ustr.eop.gov.*

Comments will be placed in the docket and open to public inspection, except business confidential information. Comments may be viewed on the *www.regulations.gov* Web site by entering Docket Number USTR–2016–

2013 in the "Search" field on the home page.

Probir Mehta,

Assistant United States Trade Representative for Innovation and Intellectual Property Office of the United States Trade Representative.

[FR Doc. 2016–20325 Filed 8–24–16; 8:45 am]

BILLING CODE 3290–F6–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Generalized System of Preferences (GSP): Notice of Initiation of the 2016/2017 Annual GSP Product and Country Practices Review; Travel Goods Supplemental Comment Period and Hearing; Deadlines for Filing Petitions

AGENCY: Office of the United States Trade Representative.

ACTION: Notice of public hearing and request for petitions and comments.

SUMMARY: The Office of the United States Trade Representative (USTR) is prepared to receive petitions to modify the list of articles that are eligible for duty-free treatment under the Generalized System of Preferences (GSP) program and to modify the GSP status of certain GSP beneficiary developing countries because of country practices. USTR also is prepared to receive petitions requesting waivers of competitive need limitations (CNLs). In addition, USTR is seeking public comments and will convene a public hearing to receive additional information and stakeholder views regarding the potential addition of travel and luggage goods products for more economically advanced GSP beneficiary countries.

DATES: In order to be considered in the 2016/2017 Annual GSP Review, the GSP Subcommittee of the Trade Policy Staff Committee (TPSC) must receive petitions by the following deadlines:

Tuesday, October 4, 2016, 5:00 p.m.: Petitions to modify the list of articles eligible for duty-free treatment under GSP.

Tuesday, October 4, 2016, 5:00 p.m.: Petitions to review the GSP status of any beneficiary developing country.

Friday, December 2, 2016, 5:00 p.m.: Petitions requesting waivers of CNLs.

USTR will not consider petitions submitted after these deadlines. Decisions on which petitions are accepted for review, along with a schedule for any related public hearings and the opportunity for the public to provide comments, will be announced at a later date.

Travel Goods Supplemental Comment Period and Hearing

A supplemental comment period and hearing will be held to give stakeholders the opportunity to submit further information with respect to the possible addition of travel and luggage goods items as eligible articles for more advanced Beneficiary Developing Countries (BDCs). This will supplement information collected during the 2015/2016 Annual Review. The schedule for the hearing and public comments is as follows:

Tuesday, October 4, 2016, 5:00 p.m.: Deadline for submission of comments, pre-hearing briefs and requests to appear at the hearing.

Tuesday, October 18, 2016, 9:30 a.m.: The GSP Subcommittee of the TPSC will convene a public hearing on travel and luggage goods in Rooms 1 and 2, 1724 F Street NW., Washington DC 20508.

Tuesday, November 1, 2016, 5:00 p.m.: Deadline for submission of post-hearing comments or briefs.

ADDRESSES: You should submit written comments through the Federal eRulemaking Portal: *http://www.regulations.gov.* The docket number for the 2016/2017 Annual GSP Review is USTR–2016–0009. The docket number for the Travel Goods Supplemental Comment Period and Hearing is USTR–2015–0013. Follow the instructions for submitting comments in section III below. If an interested party is unable to provide submissions as requested, please contact Naomi Freeman at (202) 395–2974 to arrange for an alternative method of transmission.

FOR FURTHER INFORMATION CONTACT: Naomi Freeman at (202) 395–2974 or *GSP@ustr.eop.gov.*

SUPPLEMENTARY INFORMATION: The GSP program provides for the duty-free importation of designated articles when imported from designated beneficiary developing countries. The GSP program is authorized by Title V of the Trade Act of 1974 (19 U.S.C. 2461, *et seq.*), as amended (Trade Act), and is implemented in accordance with Executive Order 11888 of November 24, 1975, as modified by subsequent Executive Orders and Presidential Proclamations.

I. The 2016/2017 Annual GSP Review

GSP Product Review Petitions: Any interested party, including foreign governments, may submit petitions to:

(1) Designate additional articles as eligible for GSP benefits, including to designate articles as eligible for GSP benefits only if imported from countries designated as least-developed beneficiary developing countries, or only from countries designated as beneficiary sub-Saharan African countries under the African Growth and Opportunity Act (AGOA);

(2) Withdraw, suspend or limit the application of duty-free treatment accorded under the GSP with respect to any article; and

(3) Otherwise modify GSP coverage.

Petitioners seeking to add products to eligibility for GSP benefits should note that, as provided in section 503(b) of the Trade Act (19 U.S.C. 2463(b)), certain articles may not be designated as eligible articles under GSP.

As specified in 15 CFR 2007.1, all petitions must include a detailed description of the product and the eight-digit subheading of the Harmonized Tariff Schedule of the United States (HTSUS) under which the product is classified.

Country Practices Review Petitions: Any interested party may submit a petition to review the GSP eligibility of any beneficiary developing country with respect to any of the designation criteria listed in sections 502(b) and 502(c) of the Trade Act (19 U.S.C. 2462(b) and (c)).

Competitive Need Limitations: Any interested party may submit a petition seeking a waiver of the 2016 CNL for individual beneficiary developing countries with respect to specific GSP-eligible articles (these limits do not apply to least-developed beneficiary developing countries or AGOA beneficiary countries). Before submitting petitions for CNL waivers, prospective petitioners may wish to review the 2016 year-to-date import trade data for products of interest. This data is available via the U.S. International Trade Commission's "Dataweb" database at *http://dataweb.usitc.gov/.* For more information on CNLs and how they apply to the GSP program, please visit the GSP page of the USTR Web site at *https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp.*

II. Travel Goods Supplemental Comment Period and Hearing

On June 30, 2016, the President designated certain travel and luggage goods articles as eligible for duty-free treatment to least-developed beneficiary developing counties (LDBDCs) and AGOA beneficiary countries. A decision regarding other, generally more advanced, beneficiary countries was deferred. In making any decision with regard to the provision of duty-free treatment for any eligible article from any beneficiary country, the President under section 501 of the Trade Act (19 U.S.C. 2461) must have due regard for the following factors:

(1) The effect such action will have on furthering the economic development of the developing countries through the expansion of their exports;

(2) The extent to which other major developed countries are undertaking a comparable effort to assist developing countries by granting generalized preferences with respect to imports of products of such countries;

(3) The anticipated impact of such action on U.S producers of like or directly competitive products; and

(4) The extent of the beneficiary developing countries' competitiveness with respect to eligible articles.

In the 2015/2016 GSP Annual Review, the President determined that a consideration of these factors justified the immediate provision of duty-free treatment to travel and luggage goods from LDBDCs and AGOA countries, but that more analysis was needed with respect to such goods from other, generally more advanced, beneficiary countries. The request for public comments and hearing announced in this notice are intended to create an additional formal process to collect supplemental information relevant to a decision on whether to extend duty-free treatment to this last category of GSP beneficiaries.

Interested parties need not re-submit information previously provided. However, interested parties now have an opportunity to provide any new information or analysis with respect to the possible further extension of GSP benefits for non-LDBDCs for each of the travel and luggage tariff lines under consideration in light of the above mentioned statutory criteria.

USTR aims to conclude its review of luggage and travel goods by January 2017.

III. Requirements for Submissions

All submissions for the 2016/2017 GSP Annual Review and for the Travel Goods Supplemental Comment Period and Hearing must conform to the GSP regulations set forth at 15 CFR part 2007, except as modified below. These regulations are available on the USTR Web site at *https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp/gsp-program-inf.*

All submissions must be in English and must be submitted electronically via *http://www.regulations.gov,* using docket number USTR–2016–0009 for the 2016/2017 GSP Annual Review, or docket number USTR–2015–0013 for the Travel Goods Supplemental Comment Period and Hearing. USTR will not accept hand-delivered submissions. USTR will not accept submissions for review that do not provide the information required by §§ 2007.0 and 2007.1 of the GSP regulations, except upon a detailed showing in the submission that the petitioner made a good faith effort to obtain the information required.

In order to ensure the timely receipt and consideration of submissions, USTR strongly encourages submitters to make on-line submissions, using the *www.regulations.gov* Web site. To submit comments via *www.regulations.gov,* enter the docket number for this review—either USTR–2016–0009 or USTR–2015–0013—on the home page and click "search." The site will provide a search-results page listing all documents associated with this docket. Find a reference to this notice by selecting "Notice" under "Document Type" in the "Filter Results by" section on the left side of the screen and click on the link entitled "Comment Now." For further information on using the *www.regulations.gov* Web site, please consult the resources provided on the Web site by clicking on "How to Use Regulations.gov" on the bottom of the home page.

The *www.regulations.gov* Web site allows users to provide comments by filling in a "Type Comment" field or by attaching a document using the "Upload file(s)" field. The GSP Subcommittee prefers that submissions be provided in an attached document. If a document is attached, it is sufficient to type "See attached" in the "Type Comment" field. USTR prefers submissions in Microsoft Word (.doc) or Adobe Acrobat (.pdf). If the submission is in an application other than those two, please indicate the name of the application in the "Type Comment" field.

Submissions must include, at the beginning of the submission or on the first page (if an attachment), the following text (in bold and *underlined*): (1) "2016/2017 GSP Annual Review" or "Travel Goods Supplemental Comment Period and Hearing" and (2) the eight-digit HTSUS subheading number in which the product is classified (for product petitions) or the name of the country (for country practice petitions). Interested parties submitting petitions that request action with respect to specific products also should list at the beginning of the submission, or on the first page (if an attachment) the following information: (1) The requested action; and (2) if applicable, the beneficiary developing country.

Submissions should not exceed 30 single-spaced, standard letter-size pages in 12-point type, including attachments. Any data attachments to the submission should be included in the same file as the submission itself, and not as separate files. Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter in the comments themselves. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file as the submission itself, not as separate files.

Each submitter will receive a submission tracking number upon completion of the submissions procedure at *www.regulations.gov* that will be the submitter's confirmation that the submission was received. Submitters should keep the confirmation for their records. USTR is not responsible for any delays in a submission due to technical difficulties, and is not able to provide any technical assistance for the *http://www.regulations.gov* Web site.

As noted, USTR strongly urges submitters to use *www.regulations.gov.* Any alternative arrangements must be made with Naomi Freeman in advance of submission. You can contact Ms. Freeman at (202) 395–2974.

USTR may not consider for review documents that are not submitted in accordance with these instructions.

Business Confidential Submissions: For any submissions containing business confidential information, the file name of the business confidential version should begin with the characters "BC". Any page containing business confidential information must be clearly marked "BUSINESS CONFIDENTIAL" on the top of that page. Filers of submissions containing business confidential information must also submit a public version of their comments. The file name of the public version should begin with the character "P". The "BC" and "P" should be followed by the name of the person or entity making the submission. Name submissions that do not contain business confidential information using the name of the person or entity making the submission.

Public Viewing of Review Submissions: Submissions in response to this notice, except for information granted "business confidential" status under 15 CFR 2003.6, will be available for public viewing pursuant to 15 CFR 2007.6 at *http://www.regulations.gov* upon completion of processing. You can view a submission by entering the docket number USTR–2016–0009 or

USTR–2015–0013 in the search field at *http://www.regulations.gov*.

Erland Herfindahl,

Deputy Assistant U.S. Trade Representative for the Generalized System of Preferences, Office of the U.S. Trade Representative.

[FR Doc. 2016–20054 Filed 8–24–16; 8:45 am]

BILLING CODE 3290–F6–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Meeting: RTCA Program Management Committee

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT).

ACTION: Notice of RTCA Program Management Committee Meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Program Management Committee.

DATES: The meeting will be held September 22nd 2016 from 8:30 a.m.–4:30 p.m.

ADDRESSES: The meeting will be held at RTCA, Inc., 1150 18th Street NW., Suite 910, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org*.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a Program Management Committee meeting. The agenda will include the following:

September 22nd

1. WELCOME AND INTRODUCTIONS
2. REVIEW/APPROVE
   A. Meeting Summary June 21, 2016
   B. Administrative Special Committee TOR Revisions
3. PUBLICATION CONSIDERATION/APPROVAL
   A. Final Draft, New Document—*Final Phase One, C2 Data Link MOPS and V&V (Terrestrial),* prepared by SC–228
4. INTEGRATION and COORDINATION COMMITTEE (ICC)
   A. Word Definitions/Usage—Update
   B. Cross Cutting Committee (CCC) Process Recommendations—Discussion
5. PAST ACTION ITEM REVIEW
   A. SC–214 participation with SC–223 Internet Protocol Suites Activity—Update
   B. Ad-hoc to draft words covering Cyber Security Guidelines—Update
   C. Global Aeronautical Distress and Safety System (GADSS)—Presentation
   D. Updating References to RTCA Documents Recommendations—Update
6. DISCUSSION
   A. SC–225—Rechargeable Lithium Batteries and Battery Systems—Discussion—Update on DO–311 Revision
   B. SC–223—Internal Protocol Suite (IPS) and AeroMACS—Discussion—Revised TOR Update
   C. SC–228—Minimum Performance Standards for Unmanned Aircraft Systems—Discussion—Revised TOR Update
   D. NAC—Status Update
   E. TOC—Status Update
   F. DAC—Status Update
   G. FAA Actions Taken on Previously Published Documents—Report
   H. Special Committees—Chairmen's Reports and Active Inter-Special Committee Requirements Agreements (ISRA)—Review
   I. European/EUROCAE Coordination—Status Update
7. OTHER BUSINESS
8. SCHEDULE for COMMITTEE DELIVERABLES and NEXT MEETING DATE
9. NEW ACTION ITEM SUMMARY

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on August 22, 2016.

Mohannad Dawoud,

Management & Program Analyst, Partnership Contracts Branch, ANG–A17, NextGen, Procurement Services Division, Federal Aviation Administration.

[FR Doc. 2016–20373 Filed 8–24–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Anti-Drug Program for Personnel Engaged in Specific Aviation Activities

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew a previously approved information collection. Information is collected to determine program compliance or non-compliance of regulated aviation employers, oversight planning, to determine who must provide annual Management Information System testing information, and to communicate with entities subject to the program regulations.

DATES: Written comments should be submitted by October 24, 2016.

ADDRESSES: Send comments to the FAA at the following address: Ronda Thompson, Room 441, Federal Aviation Administration, ASP–110, 950 L'Enfant Plaza SW., Washington, DC 20024.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

FOR FURTHER INFORMATION CONTACT: Ronda Thompson by email at: *Ronda.Thompson@faa.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0535.

Title: Anti-Drug Program for Personnel Engaged in Specified Aviation Activities.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: The FAA mandates specified aviation entities to conduct drug and alcohol testing under its regulations, Drug and Alcohol Testing

Program (14 CFR part 120), 49 U.S.C. 31306 (Alcohol and controlled substances testing), and the Omnibus Transportation Employee Testing Act of 1991 (the Act). The FAA uses information collected for determining program compliance or non-compliance of regulated aviation employers, oversight planning, determining who must provide annual MIS testing information, and communicating with entities subject to the program regulations.

Respondents: Approximately 7,000 affected entities annually.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 5 minutes.

Estimated Total Annual Burden: 22,902 hours.

Issued in Washington, DC, on August 17, 2016.

Ronda Thompson,

FAA Information Collection Clearance Officer, Performance, Policy, and Records Management Branch, ASP–110.

[FR Doc. 2016–20010 Filed 8–24–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Aviation Medical Examiner Program

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew a previously approved information collection. This collection is necessary in order to determine applicants' qualifications for certification as Aviation Medical Examiners (AMEs).

DATES: Written comments should be submitted by October 24, 2016.

ADDRESSES: Send comments to the FAA at the following address: Ronda Thompson, Room 441, Federal Aviation Administration, ASP–110, 950 L'Enfant Plaza SW., Washington, DC 20024.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

FOR FURTHER INFORMATION CONTACT: Ronda Thompson by email at: *Ronda.Thompson@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0604.

Title: Aviation Medical Examiner Program.

Form Numbers: FAA form 8520–2.

Type of Review: Renewal of an information collection.

Background: 14 CFR part 183 describes the requirements for delegating to private physicians the authority to conduct physical examinations on persons wishing to apply for their airmen medical certificate. This collection of information is for the purpose of obtaining essential information concerning the applicants' professional and personal qualifications. The FAA uses the information to screen and select the designees who serve as aviation medical examiners.

Respondents: Approximately 450 applicants annually.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 30 minutes.

Estimated Total Annual Burden: 225 hours.

Issued in Washington, DC, on August 17, 2016.

Ronda Thompson,

FAA Information Collection Clearance Officer, Performance, Policy, and Records Management Branch, ASP–110.

[FR Doc. 2016–20015 Filed 8–24–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Sunshine Act Meetings; Unified Carrier Registration Plan Board of Directors

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of Unified Carrier Registration Plan Board of Directors Meeting.

TIME AND DATE: One meeting will be held on September 7, 2016 from 2:00 p.m. until 5:00 p.m. Eastern Daylight Time. Another meeting will be held on September 8, 2016 from 9:00 a.m. until 11:00 a.m. Eastern Daylight Time.

PLACE: The meetings will be open to the public at the Residence Inn Washington, DC Downtown, 1199 Vermont Avenue NW., Washington, DC 20005, and via conference call. Those not attending the meetings in person may call 1–877–422–1931, passcode 2855443940, to listen and participate in the meetings.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: The Unified Carrier Registration Plan Board of Directors (the Board) will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement and to that end, may consider matters properly before the Board.

FOR FURTHER INFORMATION CONTACT: Mr. Avelino Gutierrez, Chair, Unified Carrier Registration Board of Directors at (505) 827–4565.

Issued on: August 18, 2016.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2016–20492 Filed 8–23–16; 11:15 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2015–0028; Notice 2]

Tireco, Inc., Ruling on Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Ruling on petition.

SUMMARY: Tireco, Inc. (Tireco) determined that certain Milestar brand medium truck tires do not comply with paragraph S6.5(j), and in some cases also paragraph S6.5(d), of Federal Motor Vehicle Safety Standard (FMVSS) No. 119, *New Pneumatic Tires for Vehicles with a GVWR of More Than 4,536 Kilograms (10,000 Pounds) and Motorcycles.* Tireco filed a report dated February 5, 2015, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* Tireco then petitioned NHTSA under 49 CFR part 556 for a decision that the subject noncompliance is inconsequential to motor vehicle safety. NHTSA has decided to deny Tireco's petition in part and grant it in part.

ADDRESSES: For further information on this decision contact Abraham Diaz, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366–5310, facsimile (202) 366–5930.

SUPPLEMENTARY INFORMATION:

I. Overview: Pursuant to 49 U.S.C. 30118(d) and 30120(h) (see implementing rule at 49 CFR part 556), Tireco submitted a petition for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety. In a letter dated May 7, 2015, Tireco also submitted a supplement to its petition.

Notice of receipt of the Tireco's petition was published by NHTSA in the **Federal Register** on June 24, 2015 (80 FR 36406) with a 30-day public comment period. No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) Web site at: *http://www.regulations.gov/*. Then follow the online search instructions to locate docket number "NHTSA–2015–0028."

II. Replacement Tires Involved: Affected are approximately 31,316 Milestar brand medium truck tires that were imported by Tireco and manufactured by Shandong Wanda Boto Tyre Co., LTD. in China between June 3, 2013 and January 25, 2015. Refer to Tireco's 49 CFR part 573 report in docket NHTSA–2015–0028 for detailed descriptions of the affected tires.

III. Noncompliance: Tireco states that the subject tires do not comply with paragraph S6.5(j) of FMVSS No. 119 because the affected tires are either not marked with the tire's load range letter, or incorrectly marked with the letter "J" instead of the letter "L" to designate the tire's load range. In addition, some of the affected tires also do not comply with paragraph S6.5(d) of FMVSS No. 119 because, the maximum load ratings and pressures specified on the sidewalls for both single and dual applications are both identified as "DUAL." The first rating should have been identified as "SINGLE."

IV. Rule Text: Paragraph S6.5 of FMVSS No. 119 requires in pertinent part:

> S6.5 Tire markings. Except as specified in this paragraph, each tire shall be marked on each sidewall with the information specified in paragraphs (a) through (j) of this section.
>
> . . .
>
> (d) The maximum load rating and corresponding inflation pressure of the tire, shown as follows:
>
> (Mark on tires rated for single and dual load): Max load single __kg (__lb) at __kPa (__psi) cold. Max load dual __kg (__lb) at __kPa (__psi) cold.
>
> (Mark on tires rated only for single load): Max load __kg (__lb) at __kPa (__psi) cold.
>
> . . .
>
> (j) The letter designating the tire load range.

V. Summary of Tireco's Analyses: Tireco believes that the absence of the load range marking on some of the subject tires causes little or no risk of overloading of the tires by an end-user because the tires are marked with the correct number of plies, the correct load index and the correct maximum load values, which Tireco believes provide equivalent information. Tireco also states that it has found one previous inconsequential noncompliance petition (see 79 FR 78562; December 30, 2014) in which the agency addressed the issue of a missing load range marking and believes that the agency should apply the same rationale in the case of its petition.

In the case of the MILESTAR BS628 315/80R22.5 L/20 tires marked with the incorrect load range letter "J," Tireco believes there is no safety consequence since the tires actually were designed and manufactured to be stronger than load range "J" tires by constructing them with two extra plies than typical load range "J" tires would have. Thus, there is no risk that the incorrect marking would lead to overloading by an end-user. Moreover, the paper label attached to each of the tires, which must remain attached until the time of sale, contains the correct load range information, so Tireco believes there is little, if any, possibility that a purchaser will be misled.

In the case of the MILESTAR BS623 225/70R19.5 G/14 tires that can be used in single or dual configuration, Tireco states the following:

1. Tireco believes the fact that both of the ratings were labeled as applicable to "DUAL" applications cannot realistically create a safety problem. Particularly since the tires are correctly marked with the correct maximum load capacity and inflation pressure in accordance with The Tire and Rim Association 2014 Year Book. Tireco also believes that any prospective purchaser of these tires, any operator of a truck equipped with these tires, and any tire retailer would immediately recognize that the first rating, "1800Kg (3970LBS) AT 760 KPa (110 PSI) COLD," applies to the "single" configuration, and the second rating, "1700Kg (3750LBS) AT 760 kPa (110 PSI) COLD," applies to the "dual" configuration. Such persons are fully aware that for all medium truck tires designed to be used in both single and dual configurations, the maximum load and corresponding pressure applicable to the single configuration is listed above the information applicable to the dual configuration. Such persons also would be aware that there could be no valid reason to have two different maximum loads for the dual configuration, and thus would immediately understand that the first load rating was meant to apply when the tire was utilized in a single configuration. Moreover, since the applicable inflation pressure is the same for both configurations, there is no risk that the mismarking would cause an operator to improperly inflate any of the tires.

2. Tireco states that when a tire is designed for use in both single and dual configurations, FMVSS No. 119 requires that compliance testing be conducted based on the higher, more punishing tire load. Accordingly, Tireco believes that the tires will perform safely in both configurations. Tireco also believes that this principle was relied upon in grants of two similar petitions filed by Michelin North America, Inc. (See 71 FR 77092; December 22, 2006) and (69 FR 62512; October 26, 2004).

In addition, Tireco stated its belief that all of the tires covered by this petition meet or exceed the performance requirements of FMVSS No. 119, as well as the other labeling requirements of the standard.

Tireco is not aware of any crashes, injuries, customer complaints, or field reports associated with the subject mislabelings.

Tireco stated that, as soon as they became aware of the noncompliance, it immediately isolated the noncompliant inventory in Tireco's warehouses to prevent any additional sales. Tireco will bring all of the noncompliant tires into full compliance with the requirements of FMVSS No. 119, or else the tires will be scrapped. Tireco also stated that the fabricating manufacturer has corrected the molds at the manufacturing plant, such that no additional tires will be manufactured with the noncompliance.

In summation, Tireco believes that the described noncompliance of the subject tires is inconsequential to motor vehicle safety, and that its petition should be granted to exempt Tireco from providing recall notification of noncompliance as required by 49 U.S.C. 30118 and from remedying the recall noncompliance as required by 49 U.S.C. 30120.

NHTSA'S Decision

NHTSA Analysis: The purpose for the load range marking letter required by FMVSS No. 119 S6.5(j) is to inform the tire purchaser and end user about the load carrying capabilities of the tire. In the case of the subject tires, Tireco states that the information the load range letter is meant to convey is contained on the tire because the tire is labeled with correct maximum load values, correct load index, and correct ply rating. For the MILESTAR brand tires: BS628 295/80R22.5, BS623 245/70R19.5, BD733 245/70R19.5, BA902 10.00R20, BD733 225/70R19.5, BS623 235/75R17.5, BS628 315/80R22.5, BS625 265/70R19.5, and BS623 215/75R17.5, Tireco states that the maximum load and maximum permissible inflation pressure markings conform with The Tire and Rim Association (TRA) and The European Tyre and Rim Technical Organisation (ETRTO) yearbooks.

NHTSA agrees that the missing load range letter is inconsequential to motor vehicle safety in this case because the information intended to be conveyed by the missing load range letter is contained in other markings on the tires, specifically: the maximum load and maximum permissible inflation pressure marked on the sidewall of the subject tires correctly correlates to the maximum loads and pressure listed by either the TRA or ETRTO yearbooks.

Tireco also submitted a supplemental letter for a group of tires branded MILESTAR BS628 315/80R22.5 L/20 and describes the noncompliance as not missing the tire load range letter, but rather having an incorrect load range letter marked onto the tire sidewall. This group of tires was marked with the load range letter "J", while these tires should have been marked with the load range letter "L".

NHTSA also agrees with Tireco that the load range marking noncompliance in the subject tires is inconsequential to motor vehicle safety. In this case if a consumer followed the load range "J" designation as marked, they would interpret the labeled recommended load carrying capacity to be lower than the actual load carrying capacity. Since the labeled tire load range "J" is lower than the actual load range of the tire as manufactured, Tireco understated the load carrying capability of the tire. This Tireco tire, in effect, has more load carrying capability than the marking load range "J" indicates.

Tireco also identified an additional noncompliance affecting only the MILESTAR BS623 225/70R19.5 G/14 tires. This tire, in addition to the load range letter missing, was marked with the word "DUAL" instead of the word "SINGLE" followed by its maximum load rating marking of "1800 Kg (3970 LBS) AT 760 kPa (110 PSI) COLD", and Tireco contends that this marking does not create a safety problem. NHTSA disagrees for the following reasons:

1. The purpose of the word "SINGLE" marked on a tire, preceding the maximum load rating, is to ensure that purchasers and end users understand that the loads and pressures following the word "SINGLE" correspond to single tire configuration loading. The same serves for the word "DUAL". Marking the word "DUAL" in lieu of the word "SINGLE" creates a situation in which the driver or end user of the vehicle may overload the tires. Specifically, the subject tires are incorrectly marked, "MAX LOAD DUAL 1800 Kg (3970 LBS) AT 760 KPa (110 PSI) COLD" instead of "MAX LOAD SINGLE 1800 Kg (3970 LBS) AT 760 KPa (110 PSI) COLD." This creates a scenario where a purchaser or end user could believe it is appropriate to load the tires in a dual configuration at the higher of the two marked dual loads. In this case, the correct dual load of the subject tires is "MAX LOAD DUAL 1700 Kg (3750 LBS) AT 760 Kpa (110 PSI) COLD" and the incorrect marking is "MAX LOAD DUAL 1800 Kg (3970 LBS) AT 760 KPa (110 PSI) COLD". The tires could be overloaded by 220 lbs per tire; in a dual configuration on a single axle the overloading factor is 4 thereby creating an overloading condition of 880 lbs per axle. Overloading these tires is a potential safety issue.

2. Tireco cites a petition for inconsequential noncompliance filed by Michelin North America, Inc. (71 FR 77092; December 22, 2006), which was granted, and Tireco contends that the same ruling should apply to their petition. In Michelin's case the noncompliance was that the value of the load following the word "DUAL" was incorrectly marked. However, the load values following the word "DUAL" were within the safety factor range associated for similar radial truck tires of its size. Furthermore a safety factor could be computed since both "SINGLE" AND "DUAL" words were marked on the tire. In Tireco's case, the safety factor cannot be computed since the word "SINGLE" is not marked and information is not readily available to the end user or purchaser of the tire as to which is the single load. Having marked the word "DUAL" in place of the word "SINGLE" eliminates the inclusion of a safety factor for a dual configuration. This results in a risk to safety.

3. Tireco also states that that when a tire is designed for use in both single and dual configurations, FMVSS No. 119 requires that compliance testing be done based on the higher, more punishing tire load. Tireco states that this indicates that the tires will therefore perform safely in both the single and dual configurations. Tireco states that this principal is states in two petitions filed by Michelin North America, Inc. that were granted by the agency. See71 FR 77092 (Dec. 22, 2006); 69 FR 62512 (Oct. 26, 2004). Both petitions cited by Tireco involved tires for which the maximum load and tire pressure of the tire for the dual configuration was incorrect but the maximum load and tire pressure for the single configuration was correctly marked. In the 2006 petition, NHTSA granted the petition, in part, because the incorrect stated maximum load of the tire in the dual configuration was still the safety factor for use in that configuration for that tire. NHTSA does not believe the facts in the two Michelin petitions cited by Tireco support a grant of this petition. In the case of the noncompliant tires that are the subject of this petition, the load intended to be used in the single configuration is preceded by the word "DUAL." Therefore, the safety factor for the tires is eliminated in the as used condition, as the tires could be mistakenly loaded to the maximum load for the single configuration when used in the dual configuration. This increases the risk to safety for the users of vehicles on which these tires are mounted.

4. Tireco also contends that any purchaser of the subject tires and any operator of a truck equipped with the tires would immediately recognize that the first rating "MAX LOAD DUAL 1800 Kg (3970 LBS) AT 760 Kpa (110 PSI) COLD" applies to the "SINGLE" configuration, and the second rating "MAX LOAD DUAL 1700 Kg (3750 LBS) AT 760 Kpa (110 PSI) COLD" applies to the "DUAL" configuration. Such persons are fully aware that for all medium truck tires designed to be used in both single and dual configurations, the maximum load and corresponding pressure applicable to the single configuration is listed above the information applicable to the dual configuration. NHTSA does not agree with Tireco's reasoning here since a tire purchaser or end user of the subject tires may not be fully aware that the first rating applies to single configuration loading unless the word "SINGLE" is marked on the sidewall. As wrongly marked with the word "DUAL," instead of the word "SINGLE," the possibility for confusion and associated safety compromise exists.

5. Additionally on March 15, 2016, Tireco submitted test data to NHTSA for review. This data consisted of endurance testing conducted by Shandong Wanda Boto Tyre Co., LTD. to

support its basis that the tires are safe for use. This additional testing was performed at loads, speeds, and timing greater than the minimum requirements of FMVSS No. 119 with a duration of 121.6 hours of testing which is 74.6 hours beyond the minimum requirements. Yet the agency does not agree that the additional data is sufficient to support the overload condition in the dual configuration because the tires would be expected to operate for much longer than 121.6 hours in the field.

The subject tires as improperly marked indicate a maximum dual load rating capacity value above that designed for the tire. A tire loaded above its designed maximum load rating capacity creates a potential safety problem for the driver of that motor vehicle and others on the road.

For the reasons stated above, NHTSA does not believe that the “DUAL” marking noncompliance on the subject MILESTAR BS623 225/70R19.5 G/14 tires is inconsequential to motor vehicle safety. *NHTSA Decision:* NHTSA has decided to deny Tireco's petition in part and grant it in part.

In the case of the subset of the subject tires that were marked “DUAL” instead of “SINGLE,” Tireco has not met its burden of persuasion that the noncompliance with paragraph S6.5(d) of FMVSS No. 119 is inconsequential to motor vehicle safety. Accordingly, Tireco is obligated to provide notification of and a free remedy for that noncompliance under 49 U.S.C. 30118 and 30120.

In the cases of the described load range letter marking noncompliances, NHTSA has decided that Tireco has met its burden of persuasion that the noncompliances with paragraph S6.5(j)of FMVSS No. 119 are inconsequential to motor vehicle safety and that Tireco is therefore exempted from the obligation of providing notification of, and a remedy for, the load range letter marking noncompliances under 49 U.S.C. 30118 and 30120.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers from only the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, any decision on this petition applies only to the subject tires that Tireco no longer controlled at the time it determined that the noncompliance existed. However, any decision on this petition does not relieve equipment distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant tires under their control after Tireco notified them that the subject noncompliance existed.

Authority: 49 U.S.C. 30118, 30120: delegations of authority at 49 CFR 1.95 and 501.8.

Issued on: August 19, 2016.

Gregory K. Rea,

Associate Administrator for Enforcement.

[FR Doc. 2016–20330 Filed 8–24–16; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Revision; Comment Request; Diversity Self-Assessment Template for Entities Regulated by the OCC

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a revised information collection, as required by the Paperwork Reduction Act of 1995 (PRA). The OCC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC previously received OMB approval for a voluntary information collection in the Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies (Policy Statement). The OCC now is soliciting comment on a revised information collection which adds a “Diversity Self-Assessment Template for Entities Regulated by the OCC” (Template) to facilitate the self-assessment described in the Policy Statement.

DATES: Comments must be submitted on or before October 24, 2016.

ADDRESSES: Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are encouraged to submit comments by email, if possible. Comments may be sent to: Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, Attention: 1557–0334, 400 7th Street, SW., suite 3E–218, mail stop 9W–11, Washington, DC 20219. In addition, comments may be sent by fax to (571) 465–4326 or by electronic mail to *prainfo@occ.treas.gov.* You may personally inspect and photocopy comments at the OCC, 400 7th Street, SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments by calling (202) 649–6700 or, for persons who are deaf or hard of hearing, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

All comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information with your comment, attachment, or supporting materials that you consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, OCC Clearance Officer, (202) 649–5490 or, for persons who are deaf or hard of hearing, TTY, (202) 649–5597, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7th Street, SW., suite 3E–218, mail stop 9W–11, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), certain Federal agencies must obtain approval from OMB for each collection of information that they conduct or sponsor. “Collection of information” is defined in 44 U.S.C. 3502(3) (and 5 CFR 1320.3(c) of the PRA implementing regulations) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. The PRA (44 U.S.C. 3506(c)(2)(A)) directs these Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing this notice of a proposed revision to the collection of information.

Title: Diversity Self-Assessment Template for Entities Regulated by the OCC.

OMB Control No.: 1557–0334.

Description: The OCC previously received OMB approval for a voluntary information collection with respect to the Policy Statement, pursuant to which entities regulated by the OCC voluntarily self-assess their diversity policies and practices.[1] This proposed revision to that collection would add the Template to assist with the self-assessment. The Template (1) asks for general information about a respondent; (2) includes a checklist of the standards set forth in the Policy Statement; (3) seeks additional diversity data; and (4) provides an opportunity for a respondent to provide other information regarding or comment on the self-assessment of its diversity policies and practices. The OCC estimates that use of the Template would reduce the average response time for this collection per respondent from 12 hours to 8 hours. A draft of this Template can be viewed at *www.occ.gov/divselfassessment.* The OCC may use the information submitted by the entities it regulates to monitor progress and trends in the financial services industry with regard to diversity and inclusion in employment and contracting activities and to identify and highlight those policies and practices that have been successful. The OCC will continue to reach out to the regulated entities and other interested parties to discuss diversity and inclusion in the financial services industry and share leading practices. The OCC may also publish information disclosed by the entity, such as any identified leading practices, in any form that does not identify a particular institution or individual or disclose confidential business information.

Type of Review: Revision.

Affected Public: Businesses or other for-profit.

Burden Estimates:

Number of Respondents: 215.

Revised Annual Burden for Policy Statement and Template: 8 hours.

Frequency of Response: Annual.

Comments: The comments submitted in response to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the information collection burden;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: August 18, 2016.

Stuart Feldstein,

Director, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency.

[FR Doc. 2016–20387 Filed 8–24–16; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0118]

Proposed Information Collection (Transfer of Scholastic Credit (Schools) (FL–315))

ACTIVITY: Comment Request.

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 26, 2016.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov,* or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov.* Please refer to "OMB Control No. 2900–0118," in any correspondence.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–5870 or email *cynthia.harvey-pryor@va.gov* . Please refer to "OMB Control No. 2900–0118."

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C. 3501–21), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Transfer of Scholastic Credit (Schools)—(FL 22–315).

OMB Control Number: 2900–0118.

Type of Review: Revision of a currently approved collection.

Abstract: VA FL 22–315 is used when a student is receiving Department of Veterans Affairs (VA) education benefits while enrolled at two training institutions at the same time. The institution at which the student pursues his approved program of education must verify that courses pursued at a second or supplemental institution will be accepted as full credit toward the student's course objective.

Affected Public: Individuals or households.

Estimated Annual Burden: 1,769 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: Annually.

Estimated Number of Respondents: 10,614.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Program Specialist, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–20339 Filed 8–24–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0117]

Proposed Information Collection (VA Form Letter 5–127, Inquiry Concerning Applicant for Employment) Activity: Comment Request

AGENCY: Human Resources Administration, Department of Veterans Affairs.

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[1] 80 FR 33016 (June 10, 2015).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 26, 2016.

ADDRESSES: Submit written comments on the collection of information through *wwwRegulations.gov*, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov.* Please refer to "OMB Control No. 2900–0117" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–5870 or email *cynthia.harvey-pryor@va.gov* . Please refer to "OMB Control No. 2900–0117"

SUPPLEMENTARY INFORMATION:

Title: VA Form Letter 5–127, Inquiry concerning Applicant for Employment.

OMB Control Number: 2900–0117.

Type of Review: Extension of a Currently Approved Collection.

Abstract: The information obtained through use of VA Form Letter 5–127 is used by appointing officials in determining an applicant's suitability and qualifications for employment.

Affected Public: Individuals or households.

Estimated Annual Burden: 3,125 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: Annual.

Estimated Number of Respondents: 12,500.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Program Specialist, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–20338 Filed 8–24–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0589]

Proposed Information Collection: (Acquisition Regulation (VAAR) Clause 852.270–3, Purchase of Shellfish); Activity: Comment Request

AGENCY: Office of Acquisition and Logistics, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Office of Acquisition and Logistics (OAL), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its respondent total, burden; and includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 26, 2016.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov*, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov.* Please refer to "OMB Control No. 2900–0589" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–5870 or email *cynthia.harvey-pryor@va.gov.* Please refer to "OMB Control No. 2900–0589."

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

Title: Veterans Affairs Acquisition Regulation (VAAR) Clause 852.270–3, Purchase of Shellfish.

OMB Control Number: 2900–0589.

Type of Review: Extension without change of a previously approved collection.

Abstract: VAAR clause 852.270–3 requires that a firm furnishing shellfish to VA must ensure that the shellfish is packaged in a container that is marked with the packer's State certificate number and State abbreviation. In addition, the firm must ensure that the container is tagged or labeled to show the name and address of the approved producer or shipper, the name of the State of origin, and the certificate number of the approved producer or shipper. This information normally accompanies the shellfish from the packer and is not information that must be separately obtained by the seller. The information is needed to ensure that shellfish purchased by VA comes from a State- and Federal-approved and inspected source. The information is used to help ensure that VA purchases healthful shellfish. The contracting officer will use the information to evaluate whether or not the item offered meets the specification requirements. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 81 FR 120, on June 22, 2016, pages 40772 and 40773.

Affected Public: Private Sector—Business or other for-profit and Not-for-profit institutions.

Estimated Annual Burden: .5 hours.

Estimated Average Burden per Respondent: 1 minute.

Frequency of Response: On occasion.

Estimated Number of Respondents: 25.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Program Specialist, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–20362 Filed 8–24–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0593]

Proposed Information Collection (Acquisition Regulation (VAAR) Provision 852.214–70, Caution to Bidder—Bid Envelopes); Activity: Comment Request

AGENCY: Office of Acquisitions and Logistics, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Office of Acquisitions and Logistics (OAL), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its respondent total, burden; and includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 26, 2016.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov,* or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov.* Please refer to "OMB Control No. 2900–0593" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–5870 or email *cynthia.harvey-pryor@va.gov.* Please refer to "OMB Control No. 2900–0593."

SUPPLEMENTARY INFORMATION:

Title: Veterans Affairs Acquisition Regulation (VAAR) Provision 852.214–70, Caution to Bidder—Bid Envelopes.

OMB Control Number: 2900–0593.

Type of Review: Extension without change of a previously approved collection.

Abstract: VAAR provision 852.214–70, advises bidders that it is their responsibility to ensure that their bid price cannot be ascertained by anyone prior to bid opening. It also advises bidders to identify their bids by showing the invitation number and bid opening date on the outside of the bid envelope. The Government often furnishes a blank bid envelope or a label for use by bidders/offers to identify their bids. The bidder is advised to fill in the required information. This information requested from bidders is needed by the Government to identify bid envelopes from other mail or packages received without having to open the envelopes or packages and possibly exposing bid prices before bid opening. The information will be used to identify which parcels or envelopes are bids and which are other routine mail. The information is also needed to help ensure that bids are delivered to the proper bid opening room on time and prior to bid opening. The contracting officer will use the information to evaluate whether or not the item offered meets the specification requirements. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 81 FR 120, on June 22, 2016, pages 40773 and 40774.

Affected Public: Business or other for profit and not-for-profit institutions.

Estimated Annual Burden: 2 hours.

Estimated Average Burden per Respondent: 10 seconds.

Frequency of Response: On occasion.

Estimated Number of Respondents: 640.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Program Specialist, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–20363 Filed 8–24–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0586]

Proposed Information Collection (Veterans Affairs Acquisition Regulation (VAAR) Clause 852.211–72, Technical Industry Standards); Activity: Comment Request

AGENCY: Office of Acquisition and Logistics, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Office of Acquisition and Logistics (OAL), Department of Veterans Affairs (VA), will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 26, 2016.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov,* or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov.* Please refer to "OMB Control No. 2900–0586 in any correspondence.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–5870 or email *cynthia.harvey-pryor@va.gov* . Please refer to "OMB Control No. 2900–0586."

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

Title: Veterans Affairs Acquisition Regulation (VAAR) Clause 852.211–72, Technical Industry Standards.

OMB Control Number: 2900–0586.

Type of Review: Extension without change of a currently approved collection.

Abstract: VAAR provision 852.211–72 requires that items offered for sale to VA under the solicitation conform to certain technical industry standards, such as Underwriters Laboratory (UL) or the National Fire Protection Association, and that the contractor furnish evidence to VA that the items meet that requirement. The evidence is normally in the form of a tag or seal affixed to the item, such as the UL tag on an electrical cord or a tag on a fire-rated door. This requires no additional effort on the part of the contractor, as the items come from the factory with the tags already in place, as part of the manufacturer's standard manufacturing operation. Occasionally, for items not already meeting standards or for items not previously tested, a contractor will have to furnish a certificate from an acceptable laboratory certifying that the items furnished have been tested in accordance with, and conform to, the specified standards. Only firms whose products have not previously been tested to ensure the products meet the industry standards required under the solicitation will be required to submit a separate certificate. The information will be used to ensure that the items being purchased meet minimum safety standards and to protect VA employees, VA beneficiaries, and the public. The contracting officer will use the information to evaluate whether or not the item offered meets the specification requirements.

Affected Public: Private Sector—Business or other for-profit and not-for-profit institutions.

Estimated Annual Burden: 1225 hours.

Estimated Average Burden per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 2,450.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Program Specialist, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–20341 Filed 8–24–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0003]

Proposed Information Collection (Application for Burial Benefits (Under 38 U.S.C. Chapter 23), VA Form 21P–530); Activity: Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 26, 2016.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov*, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov*. Please refer to "OMB Control No. 2900–0003, VA Form 21P–530" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–5870 or email *cynthia.harvey-pryor@va.gov*. Please refer to "OMB Control No. 2900–0003, VA Form 21P–530."

SUPPLEMENTARY INFORMATION:

Title: Application for Burial Benefits (Under 38 U.S.C. Chapter 23), VA Form 21P–530.

OMB Control Number: 2900–0003.

Type of Review: Revision of a Currently Approved Collection.

Abstract: The Department of Veterans Affairs (VA), through its Veterans Benefits Administration (VBA), administers an integrated program of benefits and services established by law for veterans, service personnel, and their dependents and/or beneficiaries. Information is requested by this form under the authority of 38 U.S.C. chapter 23 "Burial Benefits," including 38 U.S.C. 2302, 2303, 2304, 2307, and 2308. VA uses the information provided on the form to evaluate the respondent's eligibility for monetary burial benefits, including the burial allowance, plot or internment allowance, and transportation reimbursement.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day period soliciting comments on this collection of information was published at 81 FR 36658 on Tuesday June 7, 2016.

Affected Public: Individuals or households.

Estimated Annual Burden: 33,750 hours.

Estimated Average Burden per Respondent: 15 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 135,000.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Program Specialist, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–20337 Filed 8–24–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0587]

Proposed Information Collection (Veterans Affairs Acquisition Regulation (VAAR) Clause 852.211–70, Service Data Manual); Activity: Comment Request

AGENCY: Office of Acquisition and Logistics, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), the Office of Acquisition and Logistics (OAL), Department of Veterans Affairs (VA), will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 26, 2016.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov*, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov*. Please refer to "OMB Control No. 2900–0587" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–5870 or email *cynthia.harvey-pryor@va.gov*. Please refer to "OMB Control No. 2900–0587."

SUPPLEMENTARY INFORMATION:

Title: Veterans Affairs Acquisition Regulation (VAAR) Clause 852.211–70, Service Data Manual.

OMB Control Number: 2900–0587.

Type of Review: Extension without change of a previously approved collection

Abstract: VAAR clause 852.211–70 is used when VA purchases technical medical equipment and devices or mechanical equipment. The clause requires the contractor to furnish both operator's manuals and maintenance/repair manuals with the equipment provided to the Government. This clause sets forth those requirements and sets forth the minimum standards those manuals must meet to be acceptable. Generally, this is the same operator's manual furnished with each piece of equipment sold to the general public and the same repair manual used by company technicians in repairing the company's equipment. The cost of the manuals is included in the contract price or listed as separately priced line items on the purchase order. The operator's manual will be used by the individual actually operating the equipment to ensure proper operation and cleaning. The repair manual will be used by VA equipment repair staff to repair the equipment. The contracting officer will use the information to evaluate whether or not the item offered meets the specification requirements.

Affected Public: Private Sector—Business or other for-profit and not-for-profit institutions.

Estimated Annual Burden: 621 hours.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 3725.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Program Specialist, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–20342 Filed 8–24–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0588]

Proposed Information Collection (Acquisition Regulation (VAAR) Provision 852.211–71, Special Notice); Activity: Comment Request

AGENCY: Office of Acquisition and Logistics, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), the Office of Acquisition and Logistics (OAL), Department of Veterans Affairs (VA), will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 26, 2016.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov*, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov.* Please refer to ''OMB Control No. 2900–0588'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–5870 or email *cynthia.harvey-pryor@va.gov* . Please refer to ''OMB Control No. 2900–0588.''

SUPPLEMENTARY INFORMATION:

Title: Veterans Affairs Acquisition Regulation (VAAR) Provision 852.211–71, Special Notice.

OMB Control Number: 2900–0588.

Type of Review: Extension without change of a previously approved collection.

Abstract: VAAR provision 852.211–71 is used only in VA's telephone system acquisition solicitations and requires the contractor, after award of the contract, to submit descriptive literature on the equipment the contractor intends to furnish to show how that equipment meets the specification requirements of the solicitation. The information is needed to ensure that the equipment proposed by the contractor meets the specification requirements. Failure to require the information could result in the installation of equipment that does not meet contract requirements, with significant loss to the contractor if the contractor subsequently had to remove the equipment and furnish equipment that did meet the specification requirements. The contracting officer will use the information to evaluate whether or not the item offered meets the specification requirements.

Affected Public: Private Sector—Business or other for-profit and not-for-profit institutions.

Estimated Annual Burden: 875 hours.

Estimated Average Burden per Respondent: 300 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 175.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Program Specialist, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–20343 Filed 8–24–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0652]

Agency Information Collection (Request for Nursing Home Information in Connection With Claim for Aid and Attendance (VA Form 21–0779))

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–21), this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 26, 2016.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov*, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov.* Please refer to ''OMB Control No. 2900–0652'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–5870 or email *cynthia.harvey-pryor@va.gov.* Please refer to ''OMB Control No. 2900–0652'' in any correspondence.

SUPPLEMENTARY INFORMATION:

Title: Request for Nursing Home Information in connection with Claim for Aid and Attendance (VA Form 21–0779).

OMB Control Number: 2900–0652.

Type of Review: Revision of a currently approved collection.

Abstract: VA Form 21–0779 is used to gather the necessary information to determine eligibility for pension and aid and attendance benefits based on nursing home status. The form also requests information regarding Medicaid status and nursing home care charges, so VA can determine the proper rate of payment.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 81 FR 109, on June 7, 2016, pages 36659 and 36660.

Affected Public: Individuals or Households.

Estimated Annual Burden: 10,188.

Estimated Average Burden per Respondent: 10 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 61,125.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Program Analyst, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–20364 Filed 8–24–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0325]

Agency Information Collection: VA Form 22–1999v (Certificate of Delivery of Advance Payment and Enrollment)

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 26, 2016.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov*, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov*. Please refer to "OMB Control No. 2900–0325" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–5870 or email *cynthia.harvey-pryor@va.gov*. Please refer to "OMB Control No. 2900–0325."

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–21), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA. With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Certificate of Delivery of Advance Payment and Enrollment.

OMB Control Number: 2900–0325.

Type of Review: Revision of a currently approved collection.

Abstract: VA uses information from the current collection at the beginning of the school term to ensure that advance payments have been delivered and to determine whether the student has increased, reduced, or terminated training.

Affected Public: Individuals or Households.

Estimated Annual Burden: 122 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: 4.4 annually.

Estimated Number of Respondents: 1465 respondents.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Program Specialist, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–20340 Filed 8–24–16; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0696]

Agency Information Collection (Availability of Educational Licensing, and Certification Records) Activity Under OMB Review

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

DATES: Comments must be submitted on or before September 26, 2016.

ADDRESSES: Submit written comments on the collection of information through *www.Regulations.gov*, or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to *oira_submission@omb.eop.gov*. Please refer to "OMB Control No. 2900–0696" in any correspondence.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor, Enterprise Records Service (005R1B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461–5870 or email *cynthia.harvey-pryor@va.gov*. Please refer to "OMB Control No. 2900–0696."

SUPPLEMENTARY INFORMATION:

Title: Availability of Educational Licensing, and Certification Records.

OMB Control Number: 2900–0696.

Type of Review: Extension of a currently approved collection.

Abstract: Educational institutions (including licensing and certification organizations) with approved courses or tests must make records available to government representatives. These records are used to insure that payment of benefits under the education programs VA administers have been made correctly. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 81 FR 141, on July 22, 2016, pages 47860 and 47861.

Affected Public: Educational institutions.

Estimated Annual Burden: 11,400 hours.

Estimated Average Burden per Respondent: 2 hours.

Frequency of Response: Annually.

Estimated Number of Respondents: 5,700 respondents.

By direction of the Secretary.

Cynthia Harvey-Pryor,

Program Specialist, Office of Privacy and Records Management, Department of Veterans Affairs.

[FR Doc. 2016–20365 Filed 8–24–16; 8:45 am]

BILLING CODE 8320–01–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
1985

FEDERAL REGISTER

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Part II

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Chapter 1 and Parts 1, 4, 9, et al.
Federal Acquisition Regulations; Federal Acquisition Circular 2005–90; Introduction, Fair Pay and Safe Workplaces, and Federal Acquisition Circular 2005–90; Small Entity Compliance Guide; Final Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2015–0051, Sequence No. 4]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–90; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of a final rule.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rule agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2005–90. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at *http://www.regulations.gov.*

DATES: For effective dates see separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to the FAR case. Please cite FAC 2005–90 and the specific FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755.

RULE LISTED IN FAC 2005–90

Subject	FAR case	Analyst
Fair Pay and Safe Workplaces.	2014–025	Delgado.

SUPPLEMENTARY INFORMATION: Summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR case, refer to the specific item number and subject set forth in the document following this item summary. FAC 2005–90 amends the FAR as specified below:

Fair Pay and Safe Workplaces (FAR Case 2014–025)

DoD, GSA, and NASA are issuing a final rule amending the FAR to implement Executive Order (E.O.) 13673, Fair Pay and Safe Workplaces, amended by E.O. 13683, to correct a statutory citation, and further amended by an E.O. signed today to modify the handling of subcontractor disclosures and clarify the requirements for public disclosure of documents. E.O. 13673 is designed to improve contractor compliance with labor laws and increase efficiency and cost savings in Federal contracting. As E.O. 13673 explains, ensuring compliance with labor laws drives economy and efficiency by promoting "safe, healthy, fair, and effective workplaces. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government." The E.O. was signed July 31, 2014. The Department of Labor is simultaneously issuing final Guidance to assist Federal agencies in implementation of the E.O. in conjunction with the FAR final rule.

The E.O. requires that prospective and existing contractors on covered contracts disclose decisions regarding violations of certain labor laws, and that contracting officers, in consultation with agency labor compliance advisors (ALCAs), a new position created by the E.O., consider the decisions, (including any mitigating factors and remedial measures), as part of the contracting officer's decision to award or extend a contract. In addition, the E.O. creates new paycheck transparency protections, among other things, to ensure that workers on covered contracts are given the necessary information each pay period to verify the accuracy of what they are paid. Finally, the E.O. limits the use of predispute arbitration clauses in employment agreements on covered Federal contracts. Phase-ins: (1) From October 25, 2016 through April 24, 2017, the prime contractor disclosure requirements will apply to solicitations with an estimated value of $50 million or more, and resultant contracts; after April 24, 2017, the requirements apply to solicitations estimated to exceed $500,000, and resultant contracts. (2) The requirements apply to subcontractors starting October 25, 2017. (3) The decision disclosure period covers labor law decisions rendered against the offeror during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the offer, whichever period is shorter. (4) The paycheck transparency clause applies to solicitations starting January 1, 2017. There is significant impact on small entities imposed by the FAR rule.

Dated: August 10, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Federal Acquisition Circular (FAC) 2005–90 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–90 is effective August 25, 2016 except for FAR Case 2014–025, which is effective October 25, 2016.

Dated: August 11, 2016.

Claire M. Grady,

Director, Defense Procurement and Acquisition Policy

Dated: August 12, 2016.

Jeffrey A. Koses,

Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

Dated: August 10, 2016.

William G. Roets,

Acting Assistant Administrator, Office of Procurement, National Aeronautics and Space Administration.

[FR Doc. 2016–19675 Filed 8–24–16; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4, 9, 17, 22, 42, and 52

[FAC 2005–90; FAR Case 2014–025; Docket No. 2014–0025, Sequence No. 1]

RIN 9000–AM81

Federal Acquisition Regulation; Fair Pay and Safe Workplaces

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order 13673, Fair Pay and Safe Workplaces, which is designed to increase efficiency and cost savings in Federal contracting by improving contractor compliance with labor laws. The Department of Labor is simultaneously issuing final Guidance to assist Federal agencies in

implementation of the Executive Order in conjunction with the FAR final rule.

DATES: *Effective* October 25, 2016.

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202–969–7207 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–90, FAR Case 2014–025.

SUPPLEMENTARY INFORMATION:

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II. Overview

A. Background

This final rule implements Executive Order 13673, Fair Pay and Safe Workplaces, dated July 31, 2014 (79 FR 45309, August 5, 2014), amended by Executive Order 13683, (December 11, 2014) (79 FR 75041, December 16, 2014) to correct a statutory citation, and further amended by an Executive Order to modify the handling of subcontractor disclosures and clarify the requirements for public disclosure of documents.

A FAR proposed rule was published on May 28, 2015 (80 FR 30548) to implement Executive Order 13683 (hereinafter designated as the "E.O."). Public comments were due July 27, 2015. The Department of Labor (DOL) also published its proposed Guidance on May 28, 2015 (80 FR 30574).

A first extension of the period for public comments on the FAR rule, to August 11, 2015, was published on July 14, 2015. A second extension, to August 26, 2015, was published on August 5, 2015. There were 927 respondents that made comments on the FAR proposed rule. Including mass mailings, about 12,600 responses were received on the FAR proposed rule. Respondent organizations typically submitted their responses to both DOL and FAR dockets. DOL, DoD, GSA, and NASA worked together and closely coordinated review and disposition of the comments.

The purpose of E.O. 13673 is to improve contractor compliance with labor laws in order to increase economy and efficiency in Federal contracting. As section 1 of E.O. 13673 explains, ensuring compliance with labor laws drives economy and efficiency by promoting "safe, healthy, fair, and effective workplaces. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government."

It is a longstanding tenet of Federal Government contracting that economy and efficiency is driven, in part, by contracting only with responsible contractors that abide by the law, including labor laws. However, as explained in the preamble to the proposed rule, many labor violations that are serious, repeated, willful, and/or pervasive are not being considered in procurement decisions, in large part because contracting officers are not aware of them. Even if information regarding labor law decisions is made available, contracting officers generally lack the expertise and tools to assess the severity of the labor law violations brought to their attention and therefore cannot easily determine if a contractor's actions show a lack of integrity and business ethics. See 80 FR 30548–49 (May 28, 2015).

While the vast majority of Federal contractors abide by labor laws, a number of studies suggest a significant percentage of the most egregious labor law violations identified in recent years have involved companies that received Federal contracts. In the mid-1990s, the Government Accountability Office (GAO) (then known as the General Accounting Office) issued two reports finding that Federal contracts worth more than 60 billion dollars had been awarded to companies that had violated the National Labor Relations Act (NLRA) and the Occupational Safety and Health Act (the OSH Act). See U.S. General Accounting Office, GAO/HEHS–96–8, Worker Protection: Federal Contractors and Violations of Labor Law, Report to Senator Paul Simon (1995), available at *http://www.gao.gov/assets/230/221816.pdf*; U.S. General Accounting Office, GAO/HEHS–96–157, Occupational Safety and Health: Violations of Safety and Health Regulations by Federal Contractors, Report to Congressional Requesters (1996), available at *http://www.gao.gov/assets/230/223113.pdf*. The GAO stated that contracting agencies already had the authority to consider these violations when awarding Federal contracts under the existing regulations, but were not doing so because they lacked adequate information about contractors' noncompliance. See U.S. General Accounting Office, GAO/T–HEHS–98–212, Federal Contractors: Historical Perspective on Noncompliance With Labor and Worker Safety Laws, Statement of Cornelia Blanchette before the Subcommittee on Oversight and Investigations, Committee on Education and the Workforce, House of Representatives, 2 (July 14, 1998), available at *http://www.gao.gov/assets/110/107539.pdf*.

More than ten years later, the GAO again found a similar pattern. As discussed in the preamble to the proposed rule, the GAO found that almost two-thirds of the 50 largest wage-and-hour violations and almost 40 percent of the 50 largest workplace health-and-safety penalties issued between FY 2005 and FY 2009 were made against companies that went on to receive new Government contracts. See U.S. Government Accountability Office, GAO–10–1033, FEDERAL CONTRACTING: Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors, Report to Congressional Requesters (2010), available at *http://www.gao.gov/new.items/d101033.pdf*. A 2013 report by the Senate Health, Education, Labor, and Pensions (HELP) Committee corroborated these findings. See Majority Staff of Senate Committee on Health, Education, Labor, and Pensions, Acting Responsibly? Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk, 1 (2013) (hereinafter HELP Committee Report), available at *http://www.help.senate.gov/imo/media/doc/Labor%20Law%20Violations%20by%20Contractors%20Report.pdf*.

Equally important, a number of studies suggest a strong relationship between labor law compliance and performance. One study conducted by the Center for American Progress ("At Our Expense: Federal Contractors that Harm Workers Also Shortchange Taxpayers," dated December 2013, *https://www.americanprogressaction.org/issues/labor/report/2013/12/11/80799/at-our-expense/*) found that one quarter of the 28 companies with the top workplace violations that received Federal contracts between FY 2005 and FY 2009 had significant performance problems. As cited in the preliminary regulatory impact analysis (RIA), a report by the U.S. Department of Housing and Urban Development's Office of Inspector General, Internal Audit—Monitoring and Enforcement of Labor Standards, January 16, 1985, found a "direct relationship between labor standards violations and construction deficiencies" on the Department of Housing and Urban Development (HUD) projects and revealed that poor quality work contributed to excessive maintenance costs. Similarly, a Fiscal Policy Institute report, which analyzed a random sample of 30 New York City construction contractors, concluded that a contractor with labor law violations is more than five times as likely to receive a low performance rating than a contractor with no labor law violations. See Adler Moshe, "Prequalification of Contractors: The Importance of Responsible Contracting on Public Works Projects," Fiscal Policy Institute, May 2003. In addition, in the "Background" section of the Preamble to its final Guidance, DOL cites to a number of studies describing how strengthening contractor labor-law compliance policies "can improve the quality of competition by encouraging bids from more responsible contractors that might otherwise abstain from bidding out of concern about being able to compete with less scrupulous corner-cutting companies.''

E.O. 13673 is designed to address the longstanding deficiencies highlighted in the GAO reports and thereby to increase economy and efficiency in Federal procurement by providing, to Federal contracting officers, additional relevant information and guidance with which to consider that information. To achieve this goal, the E.O. requires that prospective and existing contractors on covered contracts disclose decisions regarding violations of certain labor laws, and that contracting officers, in consultation with agency labor compliance advisors (ALCAs), a new position created by the E.O., consider the decisions, (including any mitigating factors and remedial measures), as part of the contracting officer's decision to award or extend a contract. See sections 2 and 3 of the E.O. In addition, the E.O. creates new paycheck transparency protections, among other things, to ensure that workers on covered contracts are given the necessary information each pay period to verify the accuracy of what they are paid. See section 5 of the E.O. Finally, the E.O. limits the use of predispute arbitration clauses in employment agreements on covered Federal contracts. See section 6 of the E.O.

B. The Proposed FAR Rule

On May 28, 2015, DoD, GSA, and NASA published a proposed rule at 80 FR 30548, to implement E.O. 13673. The proposed rule delineated, through policy statements, solicitation provisions, and contract clauses, how, when, and to whom disclosures are to be made and the responsibilities of contracting officers and contractors in addressing labor law violations. Specifically, a new FAR subpart 22.20 was proposed to provide direction to contracting officers on how they are to obtain disclosures from contractors on labor law decisions concerning their labor law violations; how to consider disclosures when making responsibility determinations, and decisions whether to exercise options; and how to work with ALCAs, who will advise contracting officers in assessing labor law violations, mitigating factors, and remedial measures. New solicitation provisions and contract clauses were proposed in FAR part 52 to incorporate into contracts whose estimated value exceeds $500,000, and into subcontracts over this value, other than subcontracts for commercially available off-the-shelf (COTS) items. Conforming changes were proposed to FAR subpart 9.1 to address the consideration of labor law violation information in the Federal Awardee Performance and Integrity Information System (FAPIIS) during a responsibility determination, to FAR 17.207 to address consideration of labor law decisions, mitigating factors, and remedial measures prior to the exercise of an option, and to FAR subpart 22.1 to address the appointment and duties of ALCAs.

Simultaneously, DOL issued proposed Guidance entitled ''Guidance for Executive Order 13673, Fair Pay and Safe Workplaces'' that was designed to work hand-in-hand with the FAR rule. DOL's proposed Guidance provided proposed definitions and Guidance regarding labor law decisions; how to determine whether a labor law decision is reportable; what information about labor law decisions must be disclosed; how to analyze the severity of labor law violations; and the role of ALCAs, DOL, and other enforcement agencies in addressing labor law violations. The proposed Guidance defined the term labor compliance agreement as an agreement between a contractor and an enforcement agency, and it identified the existence of such an agreement as an important mitigating factor when an ALCA assesses the contractor's labor law violations. DOL's proposed Guidance at section IV also included discussion of the E.O.'s provisions related to paycheck transparency. These requirements include satisfaction by complying with substantially similar State laws, information to be included on required wage statements, FLSA exempt-status notices, and independent contractor notifications. The proposed FAR rule incorporated DOL's Guidance, including DOL's proposed interpretations of the E.O's reference to serious, repeated, willful, pervasive and other key terms; and, as already discussed, the proposed FAR rule addressed when and how contracting officers are to consider this Guidance.

In addition to the new requirements to improve labor compliance, the proposed FAR rule required contracting agencies to ensure that certain workers on covered Federal contracts receive a wage statement document that contains information concerning that individual's hours worked, overtime hours, pay, and any additions made to or deductions taken from pay. The proposed rule also instructed contractors to inform individuals in writing if the individual is being treated as an independent contractor and not an employee. Finally, the proposed rule required that contractors and subcontractors entering into contracts and subcontracts for non-commercial items over $1 million agree not to enter into any mandatory predispute arbitration agreement with their employees or independent contractors on any matter arising under Title VII of the Civil Rights Act of 1964, as well as any tort related to or arising out of sexual assault or harassment.

For additional background, refer to the preamble for the proposed rule.

III. Discussion and Analysis of Public Comments

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the disposition of public comments in the development of the final rule. A discussion of the comments and of the changes made to the rule as a result of those comments is provided below.

A. Summary of Significant Issues

1. Summary of Significant Changes to the Proposed Rule

DoD, GSA, and NASA seek to ensure that this FAR rulemaking, like any other, results in regulatory changes that are clear, manageable, and effective. To this end, in soliciting public comment on the proposed rule, DoD, GSA, and NASA highlighted a number of issues whose shape in the final rule will play a particularly important role in the effective implementation of the E.O. These issues included: (i) How the new requirements might be phased in to give affected parties time to acclimate themselves to their new responsibilities, (ii) how disclosure requirements are best shaped to achieve a balance between transparency and a reasonable environment for contractors to work with enforcement agencies, (iii) how to avoid challenges contractors may face in evaluating labor law violations disclosed by their subcontractors, and (iv) how to craft remedies that create accountability for compliance while providing reasonable time and opportunity for contractors and subcontractors to take action. See 80 FR 30555 to 30557.

Based on the extensive and detailed public comments received in response to the proposed rule (discussed in greater detail below) and additional deliberations, DoD, GSA, and NASA have agreed on the following key actions to minimize burden for contractors and subcontractors, small and large, which include a number of changes to the proposed rule, as follows:

a. *Phase-in.* The final rule provides a measured phase-in process for the disclosure of labor law decisions to recognize that contractors and subcontractors were not previously required to track and report labor law decisions and to provide the time affected parties may need to familiarize themselves with the rule, set up internal protocols, and create or modify internal databases to track labor law decisions in a more readily retrievable manner.

Accordingly, when the rule first takes effect, the disclosure reporting period will be limited to one year and gradually increase to three years by October 25, 2018. Moreover, no disclosures will be required from prospective prime contractors during the first six months that the rule is effective (from October 25, 2016 through April 24, 2017), except from prospective contractors bidding on solicitations issued on or after October 25, 2016 for contracts valued at $50 million or more. Because of the time typically required for contractors to prepare proposals, the Government to evaluate the proposals, and the Government to select a prospective contractor for major acquisitions of this size, such entities should have adequate time to perform the more limited disclosure representation set forth in the rule.

Subcontractor disclosure is also phased in, and subcontractors will not be required to begin making disclosures until one year after the rule becomes effective. More specifically, subcontractors will be required to report labor law decisions in accordance with this rule if they are seeking to perform covered work for prospective contractors under Federal contracts awarded pursuant to solicitations issued on or after October 25, 2017.

DOL and other enforcement agencies are actively working to upgrade their tracking systems so that the need for contractor disclosures of labor law decisions may be reduced over time. DoD, GSA, NASA, and the Office of Management and Budget (OMB) intend to work closely with DOL, as part of the renewal process required under the Paperwork Reduction Act (PRA), to review progress made on system upgrades and evaluate the feasibility of phasing out disclosure requirements set forth in this rule.

Nothing in the phase-in relaxes the ongoing and long-standing requirement for agencies to do business only with contractors who are responsible sources and abide by the law, including labor laws. Accordingly, if an agency has information indicating that a prospective prime contractor has been found within the last three years to have labor law violations that warrant heightened attention in accordance with DOL's Guidance (*i.e.,* serious, repeated, willful, and/or pervasive violations), the contractor should be prepared to be asked about the violations and expect to be given an opportunity to address any remediation steps it has taken to address the violations. For this reason, entities seeking to do business with the Government are strongly encouraged to work with DOL in their early engagement preassessment process to obtain compliance assistance if they identify covered labor law decisions involving violations that they believe may be serious, repeated, willful, and/or pervasive. This assistance is available to entities irrespective of whether they are responding to an active solicitation. Working with DOL prior to competing for Government work is not required by this rule, but will allow the entity to focus its attention on developing the best possible offer when the opportunity arises to respond to a solicitation.

b. *Subcontracting.* To minimize burden on, and overall risk to, prime contractors and to create a manageable and executable process for both prime contractors and subcontractors, the final rule requires subcontractors to disclose details regarding their labor law violations (the decisions, mitigating factors and remedial measures) directly to DOL for review and assessment instead of to the prime contractor. The subcontractor then makes a statement to the prime contractor regarding DOL's response to its disclosure. The prime contractor will then consider any response from DOL in evaluating the integrity and business ethics of subcontractors. See FAR 22.2004–1(b), 22.2004–4, and 52.222–59(c) and (d) of the final rule. This approach was detailed in the preamble to the proposed rule (at 80 FR 30555 to 30557) as an alternative to the regulatory text addressing this matter. It has now been adopted after careful consideration of concerns raised by numerous respondents which would have required contractors to obtain from subcontractors with whom they have contracts exceeding $500,000 other than COTS items, the same labor compliance information that they must themselves disclose.

Respondents stated that these subcontractor disclosures would be costly, burdensome, and difficult for prime contractors to assess. They explained that contractors do not have sufficient expertise and capacity to assess subcontractor labor law violation disclosures and indicated that subcontractors working for multiple prime contractors may receive inconsistent assessments. They further explained that these disclosures would add to systems costs, both to track and properly protect the information, and could strain business relationships as companies may be reluctant to share information that they may believe is proprietary or otherwise harmful to their competitive interests.

Under the final rule, subcontractors will be required to provide information about their labor law violations to the prime only when the subcontractor is not in agreement with, or has concerns with, DOL's assessment (see FAR 52.222–59(c)(4)(ii)(C)(3)). DoD, GSA, and NASA believe that the flowdown processes set forth in the final rule should minimize the challenges identified with the proposed rule, including the need for prime contractors to obtain additional resources and expertise to track and assess subcontractor labor law violation disclosures. Equally important, DOL's review and assessment of subcontractor labor law decision information, mitigating factors, and remedial measures should help to promote consistent assessments of labor law violations and the need for further action. The E.O. has been amended to adopt this process in lieu of disclosure to the prime contractor to ensure that processes are as manageable and minimally burdensome as possible.

c. *Public Disclosure of Labor Law Decision Information.* The final rule, like the proposed rule, requires prospective prime contractors to publicly disclose certain basic information about covered violations—namely, the law violated, the case identification number, the date of the decision finding a violation, and the name of the body that made the decision. The final rule reiterates that the requirement to provide information on the existence of covered violations applies not only to civil judgments and administrative merits determinations, but also arbitral awards, including awards that are not final or still subject to court review. This is consistent with section 2(a)(i) of the E.O., which specifically requires the disclosure of arbitral awards or decisions without exception. DoD, GSA, and NASA refer readers to the Preamble of DOL's final Guidance, which explains that confidentiality provisions generally have exceptions for disclosures required by law. Moreover, there is nothing particularly sensitive about the four pieces of basic information that contractors must publicly disclose about each violation—the labor law that was violated, the case number, the date of the award or decision, and the name of arbitrator. See FAR 22.2004–2(b)(1)(i). Parties routinely disclose more information about an arbitral award when they file a court action seeking to have the award vacated, confirmed, or modified.

That said, the final rule does not compel public disclosure of additional documents the prospective contractor deems necessary to demonstrate its responsibility, such as documents demonstrating mitigating factors, remedial measures, and other steps taken to achieve compliance with labor laws. The rule states this information will not be made public unless the Contractor determines that it wants this information to be made public (see FAR 22.2004–2(b)(1)(ii)).

d. *Contract Remedies.* Consistent with the E.O.'s goal of bringing contractors into compliance the final rule adopts additional language regarding use of remedies, with the intent of reinforcing the availability and consideration of remedies, such as documenting noncompliance in past performance or negotiating a labor compliance agreement, prior to the consideration of more severe remedies (*e.g.,* terminating a contract, notifying the suspending and debarring officials).

Of particular note, the final rule enumerates the ALCA's responsibility to encourage prospective contractors and contractors that have labor law violations that may be serious, repeated, willful, and/or pervasive to work with DOL or other relevant enforcement agencies to discuss and address the violations as soon as practicable. See FAR 22.2004–1(c)(1). Early engagement with DOL through the preassessment process can give entities with violations an opportunity to understand and address concerns, as appropriate, before bidding on work so that they may focus their attention on developing the best possible offer during competition. The Office of Federal Procurement Policy (OFPP) is working with DOL, members of the FAR Council (DoD, GSA, NASA, and OFPP) and other acquisition executives, the Small Business Administration (SBA), and the SBA Office of Advocacy to highlight language in DOL's Guidance that explains how entities may avail themselves of assistance at DOL (*i.e.,* Section VI Preassessment) and, more generally, the best ways to promote understanding and early engagement whenever it makes sense.

The rule also amends the policies addressing the assessment of past performance when the contract includes the clause at 52.222–59, to recognize consideration of a contractor's relevant labor law violation information, *e.g.,* timely implementation of remedial measures, and compliance with those remedial measures (including related labor compliance agreements), and the extent to which the prime contractor addressed labor law decisions of its subcontractors. See FAR 42.1502(j). The rule calls on agencies to seek input from ALCAs for these purposes when assessing the contractor's performance. See 42.1503(a)(1)(i). Further, the rule requires contracting officers to consider compliance with labor laws when past performance is an evaluation factor (see FAR 22.2004–2(a)). This language was shaped by public comment received in response to language in the preamble of the proposed rule addressing the consideration of compliance with labor laws in evaluating contractor performance. See 80 FR 30557. DoD, GSA, and NASA note that the Councils opened FAR Case 2015–027, Past Performance Evaluation Requirements, to separately develop regulatory guidance around the consideration of contractor compliance issues more generally.

In addition, the final rule addresses the use of labor compliance agreements. The rule clarifies how the timeframe for developing a labor compliance agreement, which involves parties outside the contracting agency, is intended to interact with the acquisition process. It also speaks to basic obligations between the contractor and the contracting officer where the need for a labor compliance agreement has been identified by the ALCA. Labor compliance agreements are bilateral. Parties to the agreement (*i.e.,* a contractor or subcontractor and the enforcement agency) will need time to negotiate an appropriate agreement—time which ordinarily will go beyond that which a contracting agency would typically give to completing a responsibility determination. The contracting officer notifies the contractor if a labor compliance agreement is warranted, and states the name of the enforcement agency. Unless the contracting officer requires the labor compliance agreement to be entered into before award, the contractor is then required to state an intent to negotiate a labor compliance agreement, or explain why not.

Where a contracting officer has premised a responsibility determination (or exercise of an option postaward) on the prospective contractor's present or future commitment to a labor compliance agreement, the prospective contractor (or existing contractor) must take certain steps; the failure to do so will be taken into account and could have postaward consequences with respect to the instant contract or future contracts.

The rule promotes economy and efficiency by ensuring that the most severe labor law violations that have not yet been adequately remedied (serious, repeated, willful, and/or pervasive violations) are dealt with in a timely manner. Labor compliance agreements are designed to address these severe labor law violations. As section 1 of the E.O. states, "[c]ontractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable and satisfactory delivery of goods and services to the Federal Government." The rule provides a mechanism to allow for the time needed to negotiate an agreement reasonable to both sides. This approach should avoid situations where instant contract actions are unnecessarily delayed or prospective contractors passed over in favor of other offerors before having had reasonable time to work with the enforcement agency to address their problems, while also making sure that the contractor is taking reasonable steps after award to negotiate an appropriate agreement.

Nothing in the rule seeks to limit a contractor's ability to choose how it will remediate labor law violations or to negotiate settlement agreements. To the contrary, the rule and DOL Guidance fully anticipate that contractors will often take action on their own, or enter into settlement agreements, to remediate their labor law violations. For this reason, the rule, as well as DOL's Guidance, emphasize that contracting officers must carefully consider these actions in deciding if a contractor is a responsible source.

It is only in a limited number of situations—where the severity of labor law violations warrants heightened attention and remediation efforts taken to date are inadequate—that a contractor should expect to be advised of the need to enter into a labor compliance agreement. The agreement may address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with labor laws, measures to ensure improved future compliance, and other related matters. Except for unusual circumstances where the ALCA recommends and the contracting officer agrees that the prospective contractor must enter into a labor compliance agreement before award, prospective contractors and existing contractors will be given a reasonable opportunity to negotiate an appropriate agreement. If an entity, at its own choosing, does not take action, through a labor compliance agreement or otherwise, it will be incumbent on the agency to determine the appropriate action in light of the noncompliance. A nonresponsibility determination or exclusion action would be considered where previous attempts to secure adequate remediation by the contractor have been unsuccessful and it is necessary to protect the Government's interest. With respect to the latter, consistent with long-standing policy and practice, an entity would be given an opportunity to be heard before an agency suspension and debarment official debars the contractor in order to protect the Government's interest.

e. *Regulatory impact.* See the summary of the RIA at Section IV below.

2. Summary of Changes by Provision

The following summary highlights changes made from the proposed to final rule by section:

FAR 22.2002 Definitions

- Added within the definition of "enforcement agency" the agencies associated with each labor law.
- Deleted the definition of "labor violation" and substituted the definition of "labor law decision".
- Clarified the definition of "pervasive violations".

FAR 22.2004–1 General

- In paragraph (b) added language on subcontractors disclosing to DOL.
- Added paragraph (c) on duties of the Agency Labor Compliance Advisor (ALCA), such as providing input to the individual responsible for past performance so that the input can be considered during source selection, and making a notation in FAPIIS of the existence of a labor compliance agreement.

FAR 22.2004–2 Preaward Assessment of an Offeror's Labor Law Violations

- In paragraph (a) included contracting officer consideration of compliance with labor laws when past performance is an evaluation factor.
- Added language in paragraph (b)(1)(ii) directing that disclosures of mitigating factors and remedial measures will be made in SAM, and will not be made public unless the contractor determines that it wants this information to be made public.
- Added language in paragraph (b)(3) on the recommendations that the ALCA will make to the contracting officer.
- Clarified language in paragraph (b)(4) that identifies what the ALCA analysis shall contain.
- Added a requirement in (b)(5)(ii) for the contracting officer to document the contract file and explain how the ALCA's written analysis was considered.
- Added language in paragraph (b)(6) that disclosure of a labor law decision does not automatically render the prospective contractor nonresponsible.
- Added procedures in (b)(7) for notifying the prospective contractor if a labor compliance agreement is warranted.
- Added paragraph (c) that the contracting officer may rely on the offeror's representation, unless the contracting officer has reason to question it.

FAR 22.2004–3 Postaward Assessment of a Prime Contractor's Labor Law Violations

- Added language in paragraph (a)(2) to clarify the semiannual update requirement and minimize the disclosure burden.
- Retained wording making the ALCA responsible for monitoring SAM and FAPIIS and identifying updated information that needs to be brought to the contracting officer's attention for consideration.
- Made various conforming changes to align preaward and postaward sections, including that disclosures to the contracting officer of mitigating information in SAM will not be publicly disclosed unless the contractor determines that it wants this information to be made public.

FAR 22.2007 Solicitation Provisions (Two) and Contract Clauses (Three)

- Added date and threshold phase-in language for the FAR 52.222–59 clause. It is inserted in solicitations with an estimated value of $50 million or more, issued from October 25, through April 24, 2017, and resultant contracts, and is inserted in solicitations that are estimated to exceed $500,000 issued after April 24, 2017. (The FAR 52.222–57 and 52.222–58 provisions are not used unless this clause is used.)
- Added date phase-in language for the FAR 52.222–58 clause, which covers subcontractor disclosures. It is inserted in solicitations issued on or after October 25, 2017.

FAR Part 42

- Added text at FAR subpart 42.15 to require consideration of labor law compliance during past performance evaluations.
- Added a new paragraph 42.1503(h)(5) consolidating references to agencies entering information into FAPIIS.

FAR 52.212–3

- Conformed the definitions to changes made in FAR 22.2002, and conformed the rest of the representation to changes made in FAR 52.222–57.

FAR 52.222–57

- Added a paragraph (a)(2) on joint ventures.
- Added date and threshold phase-in language in paragraph (b).
- Added phase-in language for the decision disclosure period in paragraph (c): "rendered against the offeror during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter".
- Added a new paragraph (f) that the representation whether there are labor law decisions rendered against the offeror will be in FAPIIS

FAR 52.222–58

- Added phase-in language for the decision disclosure period.
- Added paragraph (b)(2) about nonliability for subcontractor misrepresentations, similar to the language at FAR 52.222–59(f).

FAR 52.222–59

- Conformed the definitions to changes made in FAR 22.2002.
- Added language in paragraph (b) to conform to FAR 22.2004–3 on the semiannual update.
- Moved the discussion at former (b)(4) on contract remedies to only be at FAR 22.2004–3(b)(4).
- Revised paragraph (c) to implement the alternative from the proposed rule where the subcontractor discloses to DOL. A description of the steps followed include—
    - ○ Subcontractors make a representation regarding labor law decisions;
    - ○ If the representation was affirmative, disclosures will be made to DOL; the subcontractor will provide information to the contractor regarding DOL's assessment;
    - ○ If the subcontractor disagrees with DOL's assessment, it will inform the prime contractor and provide rationale; if the subcontractor is found responsible, the prime contractor must provide an explanation to the contracting officer; and
    - ○ A similar process is followed for subcontractor updates during contract performance (see paragraph (d)).
- Added a statement in paragraph (c)(2) that disclosure of a labor law decision(s) does not automatically render the prospective subcontractor nonresponsible; the contractor shall consider the prospective subcontractor for award notwithstanding disclosure of a labor law decision. Added language that the contractor should encourage

prospective subcontractors to contact DOL for a preassessment of their record of labor law compliance.

- Added a new paragraph (f) that a contractor or subcontractor, acting in good faith, is not liable for misrepresentations made by its subcontractors about labor law decisions or about labor compliance agreements.

FAR 52.222–60

- Expanded the required elements of the wage statement, FLSA exempt-status notices, and independent contractor notices.

3. Additional Issues

a. Legal entity.

DoD, GSA, and NASA emphasize that the scope of representations and disclosures required by the final rule follows existing general principles and practices. Specifically, the requirement to represent and disclose applies to the legal entity whose name and address is entered on the bid/offer and that will be legally responsible for performance of the contract. The legal entity that is the offeror does not include a parent corporation, a subsidiary corporation, or other affiliates (see definition of affiliates in FAR 2.101). A corporate division is part of the corporation. Consistent with current FAR practice, representation and disclosures do not apply to a parent corporation, subsidiary corporation, or other affiliates, unless a specific FAR provision (*e.g.,* FAR 52.209–5) requires that additional information. Therefore, if XYZ Corporation is the legal entity whose name appears on the bid/offer, covered labor law decisions concerning labor law violations by XYZ Corporation at any location where that legal entity operates would need to be disclosed. The fact that XYZ Corporation is a subsidiary of XXX Corporation and the immediate parent of YYY Corporation does not change the scope of the required disclosure. Only XYZ Corporation's violations must be disclosed. (See also Section III.B.3.e. below).

b. Other Equivalent State Laws

Consistent with the proposed rule, the final rule limits the scope of initial implementation to decisions concerning violations of the Federal labor laws enumerated in the E.O. and violations of State Plans approved by the Occupational Safety and Health Administration (OSHA). Disclosure and consideration of decisions concerning other equivalent State law violations will not go into effect until DOL and the FAR Council seek public comment on additional Guidance and rulemaking. As a result, the number of labor law decisions that contractors and subcontractors will need to disclose for the immediate future will be significantly reduced and these entities will have additional opportunity to engage with the Federal Government on the best and least burdensome approaches for meeting those requirements before such additional requirements take effect.

B. Analysis of Public Comments

1. Challenges to Legality and Authority of the Executive Order and Implementing Regulatory Action

a. Administrative Procedure Act (APA)

Comment: Several respondents stated that the costs associated with the proposed rule (which the respondents stated are largely unquantified in the proposed rule and which the public had insufficient time to quantify during its public comment period) so greatly outweigh the benefits (which the respondents stated there is insufficient evidence to support) that there is a great decrease in economy and efficiency, and the rulemaking is not a rational exercise of Government power. They asserted that under the APA, an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" will be held unlawful and set aside. See 5 U.S.C. 706(2)(A).

Response: It is a longstanding tenet of Government contracting that economy and efficiency is driven, in part, by dealing only with responsible contractors that abide by the law, including labor laws. As section 1 of E.O. 13673 explains, compliance with labor law drives economy and efficiency by promoting "safe, healthy, fair, and effective workplaces. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government."

Many labor law violations that are serious, repeated, willful, and/or pervasive are not considered in awarding contracts, in large part because contracting officers are not aware of them. Even if information regarding labor law violations is made available, contracting officers generally lack the expertise and tools to assess the severity of the labor law violations brought to their attention and therefore cannot easily determine if a contractor's actions show a lack of integrity and business ethics. The FAR rule, in concert with DOL's Guidance, is designed to close these gaps so that the intended benefits of labor laws and the economy and efficiency they promote in Federal procurement can be more effectively realized. The Councils acknowledge that many of these benefits are difficult to expressly quantify, but point out that E.O. 13563, Improving Regulation and Regulatory Review, provides that, where appropriate and permitted by law, agencies may consider and discuss qualitative values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Respondents assert that the costs that would be imposed by the proposed rule greatly outweigh the benefits and, on this basis, conclude that the rule is arbitrary. The Councils refer respondents to the RIA which was developed, in close consultation with DOL, to evaluate the effect of the rule. As the RIA explains, the Government, consistent with E.O. 13563, has made a reasoned determination that the benefits justify the costs, as the regulation has been tailored to impose the least burden, consistent with achieving the objectives of the Fair Pay and Safe Workplaces E.O.

Of particular note, the final rule, as required by the express provisions of the E.O., limits costs by building processes within the existing Federal acquisition system with which contractors are familiar. The final rule limits the E.O.'s labor law decision disclosure requirements to contracts and subcontracts over $500,000, and excludes flowdown for contracts of COTS items—limitations which will result in excluding the majority of transactions performed by small businesses.

The final rule makes a number of important additional refinements that will work to contain costs and create a compliance process that is manageable and fair. These refinements were made after considering public comments on the proposed rule—including comments addressing specific issues that the Councils highlighted to enable further tailoring of the rule so that it imposes the least burden possible. For example:

- The final rule adopts an alternative proposal outlined in the proposed rule preamble that directs disclosure of subcontractor labor law decision information directly to DOL, rather than to the prime contractor, in order to minimize the burden and business challenges for both prime contractors and subcontractors that might arise through direct disclosure of a subcontractor's violations to the prime.

- The final rule adopts a measured phase-in process for the disclosure of labor law decisions. When the rule first takes effect, the disclosure period will be limited to one year and no disclosure will be required during the first six months, except for contractors bidding on contracts valued at $50 million or more. Subcontractors will not begin making disclosures until one year after the rule becomes effective. These steps will enable affected parties to acclimate themselves to the new processes and develop internal protocols, as necessary, without having to undertake costly measures within tight timeframes to meet compliance requirements.
- The final rule limits the scope of initial implementation to decisions concerning violations of the Federal labor laws enumerated in the E.O. and OSHA-approved State Plans. Disclosure and consideration of decisions concerning other equivalent State law violations will not go into effect until DOL and the FAR Council seek public comment on additional Guidance and rulemaking. As a result, the number of labor law decisions that contractors and subcontractors will need to report for the immediate future will be significantly reduced and these entities will have additional opportunity to engage with the Federal Government on the best and least burdensome approaches for meeting those requirements before such additional requirements take effect.

For a more comprehensive discussion on benefits and costs, see the RIA. For discussions of the publication requirements of the APA see below at Section III.B.2.a.i., at Length of Phase-in Period, and at Section III.B.13.a.

Comment: Some respondents asserted that the rule is imprecise regarding the way in which contractor labor law violations are to be assessed. The respondents stated that this imprecision invites inconsistent application across agencies, and arbitrary actions by the Government.

Response: Consistent with well-established contracting principles and practices, the rule requires that determinations regarding a prospective contractor's responsibility be made by the particular contracting officer responsible for the procurement, on a case-by-case basis. This approach helps to ensure that actions are taken in proper context. While contracting officers may reach different conclusions, steps have been taken in the context of this rulemaking that will help to promote consistency in the assessment of labor law violation information by ALCAs and the resultant advisory input to contracting officers and promote greater certainty for contractors. In particular, ALCAs will coordinate with DOL and share their independent analyses for consideration by other ALCAs. This collaboration should help to avoid inconsistent advice being provided to the contractor from different agencies. DOL has developed Guidance to assist ALCAs in meeting their requirements under the E.O. and to further enhance both inter-agency and intra-agency understanding of the process and uniformity in implementation practices. (See also discussion at Section III.B.6.a. below.)

Comment: Respondents asserted that the regulation requires State law enforcement agencies to dictate whether remediation is properly taking place. According to these respondents, this placement of power in the hands of a State for a Federal procurement is at odds with Federalism principles and improperly places contractor responsibility—a Federal determination—in the hands of a State agency, whose workplace laws may conflict with their Federal counterparts. They concluded that the rulemaking is "contrary to constitutional right, power, privilege, or immunity" and must be held unlawful and set aside. See 5 U.S.C. 706(2)(B).

Response: The only State enforcement agencies engaged under the rule are the State enforcement agencies for the OSHA-approved State Plans. Under the proposed and final rules, contracting officers, not enforcement agencies, are solely empowered to make responsibility determinations. Contracting officers have broad discretion in making responsibility determinations, and in determining the amount of information needed to make that determination, including whether conduct is being remediated. See *Impresa Construzioni Geom. Domenico Garufi* v. *U.S.*, 238 F.3d 1324, 1334–35 (Fed. Cir. 2001). Contractors are already required to report numerous types of improper conduct, including conduct that in some cases violated State laws, and contracting officers must use this information in determining whether a contractor is a responsible source. See FAR 52.209–5(a)(1)(i)(B)–(D). While contracting officers and ALCAs will carefully consider information about remediation from Federal or State enforcement agencies, a contracting officer's responsibility determination is independent of the finding of an enforcement agency—whether Federal or State—regarding whether the labor law violation has been sufficiently remediated.

Comment: Respondents contended that the FAR Council and DOL, through their regulation and Guidance respectively, are effectively amending Federal labor and employment law by creating a new enforcement scheme, with different classes of violations (*e.g.*, "serious," "repeated," "willful,"), and with new punitive sanctions that contravene Congressional intent. They believed this action is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," and must be held unlawful and set aside. See 5 U.S.C. 706(2)(C). They stated that agency action is pre-empted by established statutory schemes. Respondents cited the Davis-Bacon Act and the Service Contract Act, where Congress explicitly made suspension and debarment an available remedy, and did not make this remedy available under any of the other labor laws cited in the rule. They note that labor compliance agreements are not required or authorized for labor law violations.

Response: Neither the FAR Council's rule nor DOL's Guidance amend any Federal labor and employment laws. Instead, the rule will require contractors and subcontractors to disclose decisions concerning certain violations of some of those laws so that those decisions, if any, can be taken into account to determine whether the contractor or subcontractor has a satisfactory record of integrity and business ethics. Determining whether a contractor is a responsible source is a long-standing tenet of Federal contracting and a prerequisite to receiving a contract award. See 41 U.S.C. 3702(b), 41 U.S.C. 3703(c), and FAR subpart 9.1. Contracting officers already may consider violations of the labor laws and other laws when making responsibility determinations. Indeed, it is the very nature of the existing FAR responsibility determination to assess conduct that may be remediable or punishable under other statutes. The E.O.'s direction to require a prospective contractor to disclose certain labor law decisions so that the contracting officers can more effectively determine if that source is responsible falls well within the established legal bounds of presidential directives regarding procurement policy.

The Federal Property and Administrative Services Act (FPASA) (also known as the Procurement Act), was codified into positive law in titles 40 and 41 of the United States Code. 40 U.S.C. 101 and 121 authorize the President to craft and implement procurement policies that further the statutory goals of that Act of promoting "economy" and "efficiency" in Federal procurement. The Office of Federal Procurement Policy Act (41 U.S.C. 1101) also has the goal of promoting "economy" and "efficiency" in Federal Procurement.

By asking contractors to disclose past labor law decisions the Government is better able to determine if the contractor is likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government. See, *e.g., UAW-Labor Employment & Training Corp.* v. *Chao,* 325 F.3d 360, 366 (D.C. Cir. 2003) (affirming authority of the President under the Procurement Act to require Federal contractors, as a condition of contracting, to post notices informing workers of certain labor law rights).

Moreover, contractors are already required to report numerous types of conduct—including fraud, anti-competitive conduct, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, and receiving stolen property—that is unlawful and separately punishable under existing Federal and State laws. See FAR 52.209–5(a)(1)(i)(B)–(C). Thus, contractors and subcontractors are not being punished twice (or in any manner inconsistent with Congressional intent) for any labor law decisions that they report; instead, the reported decisions, along with other reported information, will be part of the existing responsibility determination process.

Neither the FAR Council's rule nor DOL's Guidance expand or change the availability of suspension or debarment as a statutory remedy under the labor laws. Under the existing FAR subpart 9.4, agencies are given the administrative discretion to exercise suspension and debarment to protect the Government from harm in doing business with contractors that are not responsible sources—without regard for whether other statutes specify suspension or debarment as a consequence. The rule and Guidance require contractors and subcontractors to disclose certain labor law decisions so that those decisions, if any, can be taken into account as part of responsibility determinations. The rule has been constructed to help contractors come into compliance with labor laws, and consideration of suspension and debarment is only considered when previous attempts to secure adequate remediation by the contractor have been unsuccessful and it is necessary to protect the Government's interest. The rule provides for contracting officers to take into consideration a number of mechanisms that contractors may use to come into compliance, including labor compliance agreements, that derive from labor enforcement agencies' inherent authority to implement labor laws and to work with covered parties to meet their obligations under these laws.

b. Due Process and Procedural Considerations

Comment: Respondents stated that the FAR Council has improperly promulgated labor standards under 41 U.S.C. 1707, by incorporating Guidance from DOL.

Response: The FAR rule does not promulgate new labor standards, nor does it interpret labor laws or standards. Rather, the FAR rule adopts DOL's interpretation of labor law provided in DOL's Guidance, which interprets the labor terms in the E.O. The FAR rule explains when contracting officers are to consider such guidance and, more importantly, how and when contracting officers are to interact with ALCAs who will be principally responsible for using the Guidance, along with officials from DOL and enforcement agencies, to assess covered contractor violations and provide advice to contracting officers.

Comment: One respondent stated that the rule would require the contractor to report violations that arose outside of the performance of a Government contract. The respondent stated that additional consideration of these matters has no nexus with traditional contractor responsibility determinations that relate to whether a contractor is responsible for the particular procurement and the performance of a Government contract.

Response: In issuing E.O. 13673, the President explained the broad nexus that exists between general compliance with labor laws and economy and efficiency:

> Labor laws are designed to promote safe, healthy, fair, and effective workplaces. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government. Helping executive departments and agencies to identify and work with contractors with track records of compliance will reduce execution delays and avoid distractions and complications that arise from contracting with contractors with track records of noncompliance.

As explained in the preamble to the proposed FAR rule and the preliminary RIA, a growing body of research supports the conclusion that a relationship exists between labor law violations and performance problems. This includes reports by the GAO, the Senate HELP Committee, and HUD's Inspector General; a Fiscal Policy Institute report; and reports by the Center for American Progress.

Under longstanding tenets reflected in FAR subpart 9.1 contracting officers have long had the discretion to consider violations of law, whether related to Federal contracts or not, for insights into how a contractor is likely to perform during a future Government contract. Evidence of a prospective contractor's past violations of labor laws is a basis to inquire into that contractor's potential for satisfactory labor law compliance; furthermore, how the prospective contractor has handled past violations is indicative of how it will handle future violations. Whether or not a labor law violation arose in connection with or outside of the performance of a Government contract, the contracting officer should consider the impact of that violation and the potential that future noncompliance will have in terms of the agency resources that will be required to monitor the contractor's workplace practices during contract performance.

Comment: Respondents stated that longstanding Federal procurement statutes and regulations focus contracting officers on final adjudications in determining if a contractor is in compliance with the law, as evidenced by the type of information that Congress requires for inclusion in FAPIIS. In addition, respondents noted that in the final rule implementing FAPIIS (FAR Case 2008–027, 75 FR 14059), the Councils recognized that if information regarding yet-to-be-concluded proceedings were allowed, negative perceptions could unfairly influence contracting officers to find a contractor nonresponsible, even in situations that later end with the contractor being exonerated.

These respondents pointed out that this focus helps to avoid unnecessary complexities and potential unfairness that may arise from the systematic consideration of decisions that are subject to adjudication but have not been fully adjudicated, in particular, administrative merits determinations. Such determinations may not have been approved or supported by an adjudicative body, and in some cases, are only based on an agency's reasonable cause to believe that an unlawful practice has occurred or is occurring. Respondents believed this deviation from well-established practice undermines substantive due process because, among other things, a contractor may be unable to fully explain itself during a responsibility determination if the basis of a determination is being litigated, as it would potentially require disclosure of privileged information, evidence, litigation strategy and other sensitive information to the contracting officer. Also, a contractor could find itself being denied work even though the determination might be later overturned by a court. These respondents concluded that this type of unfairness could be avoided if the rule were revised to exclude disclosure and consideration of administrative merits determinations.

Response: The Councils reaffirm their commitment, voiced in FAR Case 2008–027, to avoid the potential perception that contracting officers might be unfairly influenced by nonfinal decisions. We note that the structure of the E.O., this final rule, and particularly the DOL Guidance provide necessary steps for considering nonfinal information. Specifically, the DOL Guidance (1) informs contractors of the fact that the information being nonfinal is a mitigating factor, and (2) explains that ALCAs consider that the decision is nonfinal as a mitigating factor. Additionally, contractors have the opportunity to make mitigating factors public (see FAR 52.222–57(d)(1)(iii), its commercial item equivalent at 52.212–3(s)(3)(i)(C), and 52.222–59(b)(3)).

The Councils refer respondents to DOL's Guidance, which addresses matters relating to the violations that must be disclosed and considered. In particular, attention is directed to DOL's Preamble and the discussion of administrative merits determinations, which states, in pertinent part:

> The Department believes that the due process and related critiques of the proposed definition of administrative merits determination are unwarranted. The Order delegates to the Department the authority to define the term. See Order, § 2(a)(i). The proposed definition is consistent with the Order and the authority delegated. The Department limited the definition to a finite number of findings, notices, and documents—and only those issued "following an investigation by the relevant enforcement agency." 80 FR 30574, 30579.
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> The definition of administrative merits determination simply delineates the scope of contractors' disclosure obligations—the first stage in the Order's process. Not all disclosed violations are relevant to a recommendation regarding a contractor's integrity and business ethics. Only those that are serious, repeated, willful, or pervasive will be considered as part of the weighing step and will factor into the ALCA's written analysis and advice. Moreover, when disclosing Labor Laws violations, a contractor has the opportunity to submit all relevant information it deems necessary to demonstrate responsibility, including mitigating circumstances and steps taken to achieve compliance with Labor Laws. FAR 22.2004–2(b)(1)(ii). As the Guidance provides, the information that the contractor is challenging or appealing an adverse administrative merits determination will be carefully considered. The Guidance also states that Labor Law violations that have not resulted in final determinations, judgments, awards, or decisions should be given lesser weight. The Department believes that contractors' opportunity to provide all relevant information—including mitigating circumstances—and the guidance's explicit recognition that nonfinal administrative merits determinations should be given lesser weight resolve any due process concerns raised by the commenters.

With respect to the specific concern that a contractor could find itself being denied work even though the determination might be later overturned by a court, DOL has noted in the Preamble to its final Guidance that a very low percentage of administrative merits determinations are later overturned or vacated. For example, only about two percent of all OSHA citations are later vacated. In other words, the likelihood that a contractor could find itself being denied work even though the determination is later overturned by a court is very low.

See also discussions below in Section III.B.13.b. on DOL Guidance Content Pertaining to Disclosure Requirements; Defining Violations: Administrative Merits Determinations, Arbitral Awards, and Civil Judgments.

Comment: Respondents asserted that the regulation effectively authorizes a *de facto* debarment of contractors by creating a system where a contractor may be found nonresponsible based on the advice of an ALCA or otherwise denied work for not agreeing to enter into a labor compliance agreement when such action is recommended by the ALCA. They further contended that the rule may produce disparate, conflicting, and redundant decisions by Federal contracting officers on the issue of contractor responsibility. Such decisions run the substantial risk of violating constitutional protections of due process that have been consistently applied to combat *de facto* suspension or debarment of contractors.

Response: Evidence of a prospective contractor's past violations of labor laws is a basis to inquire into that contractor's potential for satisfactory labor law compliance; furthermore, how the prospective contractor has handled past violations is appropriately considered as being indicative of how it will handle future violations. Under longstanding tenets reflected in FAR subpart 9.1, contracting officers have the discretion to consider violations of law, whether related to Federal contracts or not, for insights into how a contractor is likely to perform during a future Government contract. These long-standing tenets also hold that determinations regarding a prospective contractor's responsibility shall be made by the particular contracting officer responsible for the procurement. Requiring that decisions be made on a case-by-case basis helps to ensure that actions are taken in proper context.

While this approach may result in different decisions by different contracting officers, steps have been taken in the context of this rulemaking that will help to promote consistency in the assessment of labor law violations and relevant labor law violation information by ALCAs and the resultant advisory input to contracting officers and will result in greater certainty for contractors. In particular, ALCAs will coordinate with DOL and share their independent analyses for consideration by other ALCAs. This collaboration should help to avoid inconsistent advice being provided to the contractor from different agencies. The ALCA's recommendation to the contracting officer is advisory, and not conclusive on the subject of responsibility. The rule does not supplant or modify suspension and debarment processes, which, consistent with current regulations, is considered in certain extreme cases when previous attempts to secure adequate contractor remediation has been unsuccessful, or otherwise to protect the Government from harm.

Comment: Respondents suggested that the rule relies on a construct that certain violations must be addressed through a contractor compliance plan. They remarked that this violates basic labor management law, because it prevents contractors from exercising choice of resolution, and hinders the right to negotiate mutually beneficial settlements between parties. The respondents further noted that through this process, DOL would have undue leverage in their enforcement of labor law violations unrelated to the scope of the responsibility determination process.

Response: The purpose of the E.O., regulation, and Guidance is to improve contractor compliance with labor laws through processes that are reasonable and manageable. Neither the rule nor the Guidance seeks to limit a contractor's ability to choose how it will remediate labor law violations or to negotiate settlement agreements. To the contrary, the rule and Guidance fully anticipate that contractors will often take action on their own, including entering into settlement agreements, to remediate their labor law violations. For this reason, the rule and Guidance both emphasize that contracting officers must carefully consider these actions in deciding if a contractor is a responsible source.

In deciding if additional action is required, the E.O. seeks to avoid unnecessary action by instructing agencies to focus on only those violations that require heightened attention because of the severity of the violations. In addition to helping ALCAs identify those serious, repeated, willful, and/or pervasive violations that warrant heightened attention, DOL's implementing Guidance makes distinctions in the weight to be given to the different types of opinions addressing a contractor's violations. DOL's Guidance provides that violations that have not resulted in a final judgment, determination, or order are to be given less weight in the ALCA's analysis, and therefore also in the contracting officer's consideration during the responsibility determination. In this way, DOL explicitly recognizes that a contractor may still be contesting the findings of an administrative merits determination. And, as already discussed, ALCAs and contracting officers must consider very carefully this information as well as any other information that the contractor calls to their attention. There are no automatic triggers in the rule that compel a contracting officer to make a nonresponsibility determination, even in light of an ALCA's recommendation to do so, or to prevent a contracting officer from exercising an option; nor is there evidence that labor law enforcement actions will be abused to pressure contractors into forfeiting their rights in order to obtain favorable responsibility determinations. In short, it is only in a limited number of situations—where agencies have concluded that contractors have not taken sufficient steps to remediate past violations and prevent future noncompliance—that a contractor should expect to be advised of the need to enter into a labor compliance agreement. Except for unusual circumstances where the ALCA recommends and the contracting officer agrees that the prospective contractor (*i.e.,* those that have been tentatively selected to receive an award and are undergoing a responsibility determination) must enter into a labor compliance agreement before award, the prospective contractor and existing contractors will be given a reasonable opportunity to negotiate an appropriate labor compliance agreement. Such agreements will accomplish the objective of mutually beneficial settlements between enforcement agencies and employers. Put another way, the labor compliance agreement is one additional tool of many, designed to help prevent situations from deteriorating to the point where exclusion becomes necessary. Thus, if an entity, at its own choosing, does not take action, through a labor compliance agreement or otherwise, it will be incumbent on the agency to determine the appropriate action in light of the noncompliance. A nonresponsibility determination or exclusion action would generally be considered only where previous attempts to secure adequate remediation by the contractor have been unsuccessful or otherwise it is necessary to protect the Government's interest. With respect to the latter, consistent with long-standing policy and practice, an entity would be given an opportunity to be heard before an agency suspension and debarment official debars the contractor in order to protect the Government's interest.

c. False Claims Act

Comment: Several respondents stated that the proposed rule requires the contractor to report a broad range of information including final court decisions and administrative merits determinations, over a three year period during which there was no previous requirement to track. As these violations are now reportable, the respondents contended that the rule creates a significant risk of litigation under the False Claims Act, as (1) contractors may not have had the systems necessary to catalogue that information when the violation occurred, and (2) it may take significant time to develop systems which are capable of tracking information in the manner required by the rule.

Response: As a general matter, the rule requires only that an offeror represent "to the best of [its] knowledge and belief" that there either has or has not been an "administrative merits determination, arbitral award or decision, or civil judgment for any labor law violation(s) rendered against the offeror". While knowingly misrepresenting the existence of a determination, decision, or judgment may result in adverse action against the contractor, an inadvertent omission would not result in the same action.

In addition, in response to public feedback explaining the challenges that some contractors may face in getting systems in place (coupled with the fact that tracking was not required when past violations occurred), the final rule provides for a phase-in of the disclosure process, initially limited to a 1-year disclosure period. Specifically, disclosure will be required no earlier than for decisions rendered on October 25, 2015 and cover to the date of the offer, or for the three years preceding the date of the offer, whichever period is shorter. During the six month period after the rule becomes effective, disclosures also will be limited to offerors and prospective contractors on contracts valued at $50 million or more; subcontractor reporting will not begin until one year after the rule's initial effective date. These phase-in mechanisms are intended to give contractors the time they need to evaluate and address their systems needs and avoid placing a covered contractor in a situation where it finds itself unable to collect and report the requisite information.

d. Other Issues

Comment: Several respondents raised concerns about the relationship between labor compliance agreements and litigation-specific settlements for violations. One respondent, in particular, stated that labor compliance agreements could overlap with and contradict provisions of settlement agreements that are already in place or administrative agreements reached as part of suspension and debarment proceedings.

Response: Labor compliance agreements, settlement agreements, and administrative agreements have similar objectives in addressing labor law violations and remedial actions; however, they differ in their specific purposes. Settlement agreements are entered into with an enforcement agency to settle a particular case. Administrative agreements that are entered into with suspending and debarring officials may address a number of types of concerns (one of which may be labor law compliance) and are entered into to address present responsibility. Labor compliance agreements may be warranted when the ALCA identifies a pattern of conduct or policies that could be addressed through preventative action. Where this is the case, the contractor's history of labor law violations demonstrates a risk to the contracting agency of violations during contract performance, but these risks might be mitigated through the implementation of appropriate compliance measures. For a discussion of the relationship between settlement agreements, labor compliance agreements, and administrative agreements resolving suspension and debarment actions the Councils refer respondents to the DOL Guidance which addresses the purpose and use of labor compliance agreements. In particular, attention is directed to DOL's Preamble and the discussion of administrative merits determinations, which states, in pertinent part:

> The Department believes that concerns about labor compliance agreements conflicting with existing settlements are unwarranted. Contractors are encouraged to disclose information about existing settlements as a potential mitigating factor in the weighing process. In determining whether a labor compliance agreement is necessary, the ALCA will consider any preexisting settlement agreement—and recommend a labor compliance agreement only where the existing settlement does not include measures to prevent future violations.
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> In addition, the Department notes that a labor compliance agreement is an agreement between a contractor and an enforcement agency. Enforcement agencies will know if they previously entered into agreements with the contractor and can assure that any labor compliance agreement does not conflict with prior agreements.

Comment: Several respondents stated that the final rule should not compel disclosure to the Government of the existence or the content of confidential arbitral proceedings that are subject to a nondisclosure agreement. In addition, even if information is shared with the Government, such information should not be disclosed to the public.

Response: The E.O. specifically requires the disclosure of arbitral awards or decisions without exception, and confidentiality provisions in non-disclosure agreements generally have exceptions for disclosures required by law. Further, the final rule requires contractors to publicly disclose only four limited pieces of information: The labor law that was violated, the case number, the date of the award or decision, and the name of the arbitrator. See FAR 22.2004–2(b)(1)(i). There is nothing particularly sensitive about this information, as evidenced by the fact that parties routinely disclose this information and more when they file court actions seeking to vacate, confirm, or modify an arbitral award. While this information may not be sensitive, disclosing it to the government as part of the contracting process furthers the E.O.'s goal of ensuring that the government works with contractors that have track records of complying with labor laws.

Comment: Several respondents commented that the proposed rule offered no explanation, or an inadequate explanation, for how a limitation on arbitration agreements would promote economy and efficiency in Federal procurement. Some of these respondents expressed the view that the proposed rule would in fact work against the stated aims of the E.O. One respondent also stated that the limitation had no connection with the Federal procurement process and should be deleted in its entirety.

Response: The Procurement Act grants the President broad authority to prescribe policies and directives that the President considers necessary to carry out the statutory purposes of ensuring economical and efficient government procurement. The limitation on arbitration agreements is a reasonable and rational exercise of that authority.

In particular, the limitation on arbitration agreements will help bring to light sexual harassment and other Title VII violations, ultimately reducing their prevalence. Allowing parties access to the courts for alleged violations of the law provides employees with the opportunity to file individual, group, or class lawsuits that can raise awareness of and redress such violations. These developments will make it easier for agencies to identify and work with contractors with track records of compliance, consistent with the overall goals of the E.O. In addition, lawsuits, and the attendant publicity they can generate, can also deter other contractors from committing similar infractions. Prohibiting pre-dispute arbitration may also increase employee perceptions of fairness in workplace dispute mechanisms, thereby improving employee morale and productivity.

Finally, DoD, the Federal government's largest contracting agency, is currently subject to a nearly identical (and more restrictive) limitation on mandatory arbitration. The rule would extend similar restrictions to all contractors, helping make regulations more consistent across agencies and thus reducing barriers to operating with the federal government. That, in turn, helps to enhance competition among suppliers, and competition is a well-established mechanism for achieving cost savings. These gains in economy and efficiency would come with limited burdens for contractors, as many are already doing business with DoD, and are thus already subject to these restrictions. Further, nothing in the E.O. or final rule prohibits employers or workers from choosing voluntarily to arbitrate a dispute—the E.O. and rule simply prevent an employer from unilaterally controlling the means of dispute resolution before any disputes arise.

Comment: Respondents commented that the exception for arbitrations conducted pursuant to collective bargaining agreements improperly penalized contractors without collective bargaining agreements and recommended the exception be removed.

Response: Unlike mandatory arbitration clauses in employment contracts with individual employees, dispute resolution procedures set forth in a collective bargaining agreement are jointly agreed upon by employers and employees. These dispute resolution procedures are therefore more likely to be perceived as fair, and thus unlikely to undermine employee morale and productivity. Collective bargaining agreements also tend to feature protections for workers coming forward with grievances, which increase the likelihood that sexual harassment and Title VII violations will be brought to light and hence enable agencies to identify and work with contractors with records of compliance. The rationales that generally support banning mandatory arbitration of covered claims thus do not apply in the context of a collective bargaining agreement negotiated between the contractor and a labor organization representing the contractor's employees.

Comment: Respondents recommended that contractors who retain forced arbitration provisions for employment disputes other than those specifically prohibited by the regulation should be barred from enforcing those remaining forced arbitration provisions in the event disputes arise out of the same set of facts.

Response: To be consistent with DoD's existing regulations and the requirements of the E.O., this rule does not apply the limitation on mandatory pre-dispute arbitration to aspects of an agreement unrelated to the covered areas. Establishing consistent rules across government agencies helps to enhance competition among suppliers, which is a well-established mechanism for achieving cost savings for the Federal government.

Comment: Several respondents commented that the proposed rule's coverage on arbitration is invalid and unenforceable because it conflicts with Federal statute, U.S. Supreme Court precedent, current regulation, or should otherwise only be accomplished through Congressional legislation. Respondents provided the following in support of their comments: *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (the Federal Arbitration Act reflects a "liberal federal policy favoring arbitration agreements") *AT&T Mobility LLC* v. *Concepcion,* 563 U.S. 333, 339 (2011) ("The FAA (Federal Arbitration Act) was enacted in 1925 in response to widespread judicial hostility to arbitration agreements.") *CompuCredit* v. *Greenwood,* 565 U.S. 95 (2012), and similar rulings, which uphold the enforceability of arbitration agreements pursuant to the Federal Arbitration Act.

Response: The Federal Arbitration Act provides for the validity and enforceability of arbitration agreements. The final rule, consistent with the proposed rule, does not alter the validity or enforceability of such agreements; indeed, the E.O. makes clear that it does not disturb existing pre-dispute arbitration agreements unless those agreements are renegotiated or replaced in a process that allows changes to the terms to the contract. Therefore, the final rule does not conflict with the Federal Arbitration Act.

The government does, however, generally have the authority to decide which companies it will contract with and what terms such contracts will contain. The final rule accordingly provides that contracting agencies in their capacity as contracting parties shall not, with some exceptions, enter into contracts with contractors who utilize certain types of mandatory arbitration agreements with their employees. Contractors remain free to require employees to enter into mandatory pre-dispute arbitration agreements of claims that do not arise under Title VII or torts relating to sexual assault or harassment, and may further seek to arbitrate covered disputes when they arise.

Comment: Respondents argued that failure to include the cost of reporting equivalent State labor law violations circumvents the intent of the Congressional Review Act (CRA), the Small Business Regulatory Enforcement Fairness Act (SBREFA) as part of the Regulatory Flexibility Act (RFA), and E.O. 12866. Respondents indicated that when the cost of a proposed rule is estimated to have a cost impact of more than $100 million on the economy, each of these Federal laws require the agency proposing the rule to undertake additional regulatory review steps.

Response: The proposed and final FAR rules do not address the cost of reporting violations related to equivalent State laws (other than OSHA-approved State Plans) because the rule and DOL's Guidance do not implement those requirements of E.O. 13673. In response to what the Councils and DOL learned from public comments and public outreach sessions regarding the best way to create a fair, reasonable, and implementable process, the FAR rule and DOL Guidance will phase in parts of the E.O. over time. As part of the phase-in plan, contractors will not be required to disclose labor law decisions related to equivalent State laws immediately (other than for OSHA-approved State Plans), which will significantly reduce the number of labor law decisions that a contractor or subcontractor will need to report. Separate Guidance and an additional rulemaking will be pursued at a future date to identify equivalent State laws, and such requirements will be subject to public notice and comment before they take effect. The notice of proposed rulemaking accompanying this subsequent action will address the cost of disclosing labor law decisions concerning violations of equivalent State labor laws and address applicable requirements of the CRA, SBREFA, RFA, and E.O. 12866.

2. *Various Alternatives to the Proposed Rule*

a. Alternatives That Were Presented in the Proposed Rule

Introductory Summary: The proposed rule asked for consideration of, and comment on, alternatives to three aspects of the rule: (i) Phase-in of subcontractor disclosure requirements, (ii) subcontractor disclosures and contractor assessments, (iii) contractor and subcontractor remedies. The Councils reviewed and considered public comments in development of the final rule and have implemented revisions as follows:

Phase-in (of Disclosure Requirements). In addition to comments received on subcontractor phase-in, a number of concerns, comments, and additional phase-in options were offered with regard to the ability of prime contractors to comply with the rule immediately on the effective date. In order to best enable compliance with the rule, the Councils have implemented the following phase-in periods for representations and disclosures (see FAR 22.2007, 52.222–57 and its commercial items equivalent at 52.212–3, 52.222–58, 52.222–59):

- Prime Contractor Representations and Disclosures
  - ○ For the first 6 months after the rule's effective date (October 25, through April 24, 2017), representations and disclosures are required for solicitations expected to result in contracts valued at $50 million or more.
  - ○ After the first 6 months (after April 24, 2017), representations and disclosures are required for solicitations expected to result in contracts valued at greater than $500,000.

- Subcontractor Representations and Disclosures

Beginning 12 months after the rule's effective date (October 25, 2017), representations and disclosures are required for solicitations expected to result in subcontracts valued at greater than $500,000 other than COTS.

- Labor Law Decision Preaward Disclosure Period—Prime and Subcontractor

Whenever preaward disclosures are required they must cover decisions rendered during the time period beginning October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter.

Subcontractor Disclosures and Contractor Assessments. The proposed rule offered alternative language for subcontractor disclosures and contractor assessments of labor law violation information; the final rule adopts this alternative approach. In the final rule, at FAR 52.222–58 and 52.222–59(c) and (d), subcontractors disclose details regarding decisions concerning their labor law violations (and mitigating factors and remedial measures) directly to DOL for review and assessment instead of to the prime contractor. The applicability to subcontracts remains unchanged in the final rule, *i.e.*, $500,000 threshold for other than COTS.

Contractor and Subcontractor Remedies. The proposed rule offered supplemental language regarding remedial measures in order to achieve the dual goals of providing reasonable time for remedial action and accountability for unjustified inaction (FAR 22.2004–5, Consideration of Compliance with Labor Laws in Evaluation of Contractor Performance, at 80 FR 30557). The final rule instead includes language for contracting officers to consider a contractor's compliance with labor laws (including adherence to labor compliance agreements) in their evaluation of past performance (FAR 42.1502(j)). It also provides for contracting officers to consider whether labor compliance agreements have been timely entered into and complied with, at FAR 22.2004–2(b)(4); 22.2004–3(b)(3).

i. Phase-in (of Disclosure Requirements)

- Phase-In of Subcontractor Review

Comment: Several respondents recommended phase-in of the subcontractor disclosure requirement. The proposals included (1) allowing 12–18 months for phase-in, (2) delaying or phasing-in subcontractor review requirements, and (3) limiting reporting on violations to only those that arise after the effective date of the proposed rule.

Response: As stated in the summary above, the Councils agree that phase-in of subcontractor disclosures would benefit both the public and the Government and have updated the rule to provide for a phase-in period.

- Phase-In of Subcontractor Disclosures by Subcontracting Tiers

Comment: Respondents recommended that the subcontractor disclosure requirement be phased in by subcontractor tiers. Respondents recommended: (1) Applying the rule initially to prime contractors and then, after a phase-in period, expanding application only to first-tier subcontractors, and (2) creating a phase-in schedule to add one year for first-tier subcontracts, one more year for second-tier subcontracts, and one more year for lower-tier subcontracts.

Response: As stated in the summary above, the Councils have decided to apply a phase-in period to all subcontractor disclosures. This will allow sufficient time for systems and processes to be in place to implement the rule's requirements at the subcontractor level.

- Phase-In for Small Businesses

Comment: The SBA Office of Advocacy and other respondents recommended (in addition to the phase-in for subcontractors), that the Councils consider providing a phase-in period for small business prime contractors. The SBA Office of Advocacy recommended that this phase-in period be long enough to allow small businesses, who are current contractors or offerors interested in contracting with the Government, to absorb the costs of the rule. Another respondent indicated that a phased approach to implementation is appropriate for small businesses, to afford them sufficient time to develop systems and modify contractual terms, and one respondent recommended that the rule exempt small businesses entirely. However, another respondent cautioned the Councils that, while considering the burden on small businesses, the Councils should avoid inadvertently providing an unfair competitive advantage when small businesses participate in unrestricted procurements.

Response: As stated in the introductory summary above, the burden for all businesses, including small businesses, under the rule will be greatly reduced by phased-in application of the rule regarding disclosures by prime contractors and subcontractors.

Comment: A respondent recommended the phase-in apply to all subcontractors and not make distinctions among subcontractor tiers. The respondent proposed two distinct one-year phase-in periods for subcontractor disclosure and for update requirements and provided suggested FAR text changes.

Response: The Councils concur that a phase-in of application to subcontractors will allow an opportunity for contractors and subcontractors to become acclimated to the tracking, reporting, and reviewing requirements of this rule.

- Phase-In for Other-Than-Small Businesses

Comment: Several respondents recommended a phase-in or delayed effective date for prime contractors with the most recommended timing for a phase-in being one year. The recommendations included: (1) A significant period for phase-in to develop mechanisms for reporting, collecting, and evaluating information; (2) limiting initial application to prime contractors, specifically those subject to full Cost Accounting Standards compliance requirements; (3) an initial phase-in period for contracts valued over $10,000,000; phase-in for both prime contractors and subcontractors; and a phased approach over at least 5 years.

Response: The Councils have revised the rule to phase in application of the rule to prime contractors and subcontractors as described in the summary above.

- Length of Phase-In Period

Comment: Respondents made various recommendations for phase-in of the three year period for disclosures: That it be reduced to six to twelve months; that it begin four years after the rule's effective date; that it be increased to five years consistent with the FAPIIS reporting requirement and to enable contracting officers to conduct more thorough responsibility determinations; that it be a year at a time, *e.g.*, a year after the effective date, contractors report a year of violations; two years out, they report two years; and three years out, they report 3 years of violations.

Response: The Councils have implemented revisions in the final rule consistent with the disclosure reporting described in the above summary.

Comment: Respondents expressed concern with implementation phasing. A respondent noted that Section 10 of the E.O. indicated it will apply to solicitations as set forth in the FAR final rule, and that the E.O. Fact sheet stated that the E.O. will be "implemented on new contracts in stages, on a prioritized basis, during 2016." The respondent was concerned that the proposed rule is silent on the timing of implementation. The respondent stated that this omission is significant as the effective date and implementation strategy will have substantive implications for contractors. The respondent contended that by failing to address this issue, contractors have been deprived of the opportunity to comment on this critical point as required by the APA.

Response: The statutory publication requirement for FAR rules is found at 41 U.S.C. 1707. The APA publication section at 5 U.S.C. 553 does not apply to FAR procurement regulations. The proposed rule met the requirements of 41 U.S.C. 1707 by requesting public comment on alternatives for implementation phase-in. See paragraph A of Section IV of the proposed FAR rule preamble and paragraph 6 of the Initial Regulatory Flexibility Analysis.

Comment: One respondent suggested a lengthy phased implementation and enforcement approach, along the following lines: (1) During the first two years after the effective date of the final rule, contracting agencies and DOL would establish ALCA functions by staffing and training employees to implement the rule, and contractors would begin to establish compliance and reporting protocols and mechanisms, and train their employees, (2) During the third and fourth year the final rule should apply to new solicitations and contracts valued over $20,000,000, and $10,000,000 respectively, but only to prime contracts, and (3) During later years the threshold would be reduced and apply to subcontracts.

Response: The Councils have revised the rule to reflect a phasing as described in the summary above.

ii. Subcontractor Disclosures and Contractor Assessments

Comment: A respondent took exception to the requirement for primes to "certify" that suppliers and subcontractors are complying with the relevant labor laws and to collect this information every six months.

Response: There is no requirement for contractors to certify that their subcontractors or suppliers are complying with relevant labor laws. The requirement is for contractors to consider labor law violations when conducting determinations of subcontractor responsibility.

Comment: One respondent recommended that DOL be tasked with evaluating subcontractors' history of violations and assessing the need for a labor compliance agreement, rather than having the prime contractors carry out that function. The respondent stated that the process of evaluating compliance history and weighing the frequency and gravity of violations should be treated as an inherently governmental function.

Response: The Councils have adopted the alternative offered in the proposed rule to have DOL assess subcontractor violations. The contractor is still ultimately responsible for evaluating the subcontractor's compliance with labor laws as an element of responsibility. Determining subcontractor responsibility is not an inherently governmental function, and reflects existing policy at FAR 9.104–4(a). There is no transfer of enforcement of the labor laws as a result of the rule; the rule provides for information regarding compliance with labor laws to be considered during subcontractor responsibility determinations and during subcontract performance.

Comment: Many respondents objected to the role of contractors collecting subcontractor violation information as prescribed in the proposed rule. Several of those respondents expressed some level of support for the alternative presented. Other respondents expressed concerns that: (1) The rules for contractors are not the same or similar to the practice that contracting officers follow; (2) proposed subcontractors do not report directly to the Government; (3) the subcontractor should make a representation back to the contractor regarding any DOL response; (4) contractors should review their subcontractors' compliance on a continual or ongoing basis; (5) if the alternative is implemented, DOL would not be able to respond quickly enough; (6) if the Government were to make a recommended responsibility determination for a proposed subcontractor that the contractor making the responsibility determination might come to a different conclusion; and (7) DOL might issue inconsistent recommendations regarding different proposed subcontracts with one company.

Response: As described in the summary above, the Councils are implementing the final rule with the alternative whereby the contractor would direct the subcontractor to disclose its labor law decisions (and mitigating factors and remedial measures) to DOL, which will resolve many of the concerns expressed regarding application of the rule to subcontractors. See the full discussion of comments and responses on the subcontractor disclosure alternative below at Section III.B.5.

iii. Contractor and Subcontractor Remedies

Comment: A number of respondents recommended that the rule enumerate specific remedies or punitive measures that are available for misrepresentations and failures to disclose relevant information.

Response: FAR representations, including those in this rulemaking, are made to the best of the offeror's knowledge and belief. However, inaccurate or incomplete representations related to this rule, like other representations in the FAR, could constitute a false statement. The rule provides that the representation is a material representation of fact upon which reliance was placed when making award; if it is later determined that the offeror knowingly rendered an erroneous representation, in addition to other remedies available to the Government, the contracting officer may terminate the contract. In addition, there are existing civil and criminal penalties for making false statements to the Government that are applicable to representations and to other information not provided as part of a representation, for example, information disclosed about labor law violations.

Comment: Two respondents recommended that the representations required of contractors and subcontractors be under oath.

Response: The Councils do not agree that the representations by contractors and subcontractors should be made under oath as it is inconsistent with how FAR representations are made. Also see prior response regarding the impact of making a representation.

Comment: Respondents recommended that the remedies specified in the regulation for misrepresentations at the "check the box" representation stage also apply to the contractor or subcontractor's preaward and postaward labor law violation disclosures.

Response: There are existing civil and criminal penalties for making false statements to the Government, which would be applicable to representations and to other information not provided as part of a representation, for example, information disclosed about labor law violations. With respect to subcontracts, the rule does not discuss the penalties applicable to the prime contractor—subcontractor relationship in this FAR implementation. This is in accord with general FAR practice. Prime contractors have discretion to establish subcontract terms and conditions applicable to their subcontracts. Therefore, the Councils do not consider a change to be necessary.

Comment: A respondent recommended that the penalties for misrepresentation should apply to subcontractor disclosures and be explicitly communicated to the subcontractor by the prime or higher-tier subcontractor, or the contracting officer through the solicitation.

Response: The rule does not discuss penalties for misrepresentation by subcontractors in the provision at FAR 52.222–58, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673). However, contractors and subcontractors may draft terms and conditions for their subcontracts that include coverage of misrepresentation penalties.

Comment: A respondent recommended that the prime contractor should have a rebuttable presumption that it was not responsible for a subcontractor's false disclosure.

Response: The Councils agree that the prime is not responsible for all subcontractor misrepresentations or false statements and have revised the FAR provision at FAR 52.222–58(b) and clause at 52.222–59(f) to read that "A contractor or subcontractor, acting in good faith, is not liable for misrepresentations made by its subcontractors about labor law decisions or about labor compliance agreements."

Comment: A respondent recommended that a mechanism be provided for giving the subcontractor recourse for an erroneous negative determination by the prime contractor of the subcontractor's responsibility.

Response: Consistent with FAR 9.104–4(a), the prime contractor is generally responsible for determining the responsibility of its prospective subcontractors. Prime contractors must exercise due diligence when evaluating and selecting among prospective subcontractors. This is existing policy and implementation of the E.O. does not change this construct. The prime contractor is ultimately responsible for deciding with whom to subcontract and how to manage the subcontractor relationship. Implementing the alternative in the final rule provides DOL's subject matter expertise to the review of subcontractor labor law decisions (and mitigating factors and remedial measures) and allows for prime contractor consultation with DOL. The Councils find the existing policies sufficient and decline to establish the new mechanism requested.

Comment: A respondent recommended that the contracting officer should document a contractor's violation of a labor compliance agreement, or its refusal to enter into one, in its past performance evaluation.

Response: As described in the summary above, the final rule has been revised to include labor law compliance (including adherence to labor compliance agreements) in information considered by contracting officers in past performance evaluations (see FAR 42.1502(j)).

Comment: A respondent recommended that the rule more closely align with the contractor performance information process which provides at FAR subpart 42.15 for notice to a contractor, an opportunity for comment, and a review at a level above the contracting officer to address disagreements.

Response: The contractor performance information process provides that agency evaluations of contractor performance, including both negative and positive evaluations, shall be provided to the contractor as soon as practicable after completion of the evaluation. As described in the summary above, the final rule has been revised to include labor law compliance (including adherence to labor compliance agreements) in information considered by contracting officers in past performance evaluations (see FAR 42.1502(j)).

Comment: Respondents stated that there could be an increase in Contract Disputes Act appeals. Respondents suggested that reporting of violations could trigger adverse performance evaluations or lead to decisions not to exercise options based on responsibility determinations. Respondents noted that the FAR provides specific processes for responding to and appealing performance evaluations. In addition, where a contracting officer determines that a contractor is not responsible, such that the contract should be terminated for default or options not exercised, there may be grounds to bring claims under the contract, based on claims that the contracting officer acted arbitrarily and capriciously; there is also a right to appeal any final contracting officer decision on these grounds under the Contract Disputes Act.

Response: The Councils note that the traditional use of options under FAR part 17 involves the exercise of the option being within the discretion of the contracting officer. The intent of the E.O. is to have contractors put their efforts in improving their record of labor law violations, rather than in litigating.

Comment: A respondent recommended that FAR 22.2004–3(b)(3) be strengthened to specify that an ALCA may consider whether the contractor has entered into a collectively bargained labor compliance agreement and whether the contractor has failed to comply with an existing labor compliance agreement as an aggravating factor.

Response: The ALCA, pursuant to FAR 22.2004–3(b)(1), is required to verify, consulting with DOL as needed, whether the contractor is making progress toward, or has entered into, the labor compliance agreement. In addition, the ALCA, in developing its assessment using DOL Guidance, will consider whether a labor compliance agreement already in place is being adhered to. Specifying whether the labor compliance agreement is collectively bargained is not required by the E.O.

Comment: Respondents proposed strengthening the remedies at FAR 22.2004–3(b)(4) to provide for the suspension of payments under a contract until the labor law violation is remedied and/or an enhanced labor compliance agreement is implemented.

Response: The respondents' recommendation for suspension of payments for labor law violations is not provided for in the E.O., and under current FAR practice, contractors are entitled to be paid for work performed.

Comment: A respondent recommended that FAR 22.2004–3(b) should be amended to provide that contracting officers and ALCAs must consider all reportable labor law violations of a prime contractor's subcontractors that were committed during the period of contract performance, for those subcontractors that have not been cleared or precleared by DOL. The respondent proposed an alternative process as a remedy to address the violations of subcontractors for whom DOL had not completed an assessment prior to subcontract award. The respondent proposed that ALCAs and contracting officers, in addition to the prime, should review all subcontractor labor law violations committed during the performance period and the prime should face the same remedial action from the contracting officer as if the prime had committed the violation.

Response: We note that it appears that an underlying assumption to the respondent's comment is that the prime's decision to award or continue the subcontract was inappropriate, and that the prime was not diligently considering the labor law violations. In fact, it may have been the appropriate decision to award or continue the subcontract depending on the totality of the circumstances related to (1) the labor law violation(s), and (2) the circumstances of the particular procurement.

Comment: A respondent recommended that the FAR should require DOL to inform prime contractors directly when DOL conducts an investigation of a subcontractor and provide specific information about the subcontractor's need for and compliance with a labor compliance agreement to the contracting officer and the prime.

Response: The E.O. does not provide that DOL must notify prime contractors directly when DOL conducts an investigation of a prospective subcontractor or provide copies of an established labor compliance agreement to the contracting officer and the prime. However, a contracting officer may request a copy of a labor compliance agreement from DOL or an enforcement agency, and the contracting officer is entitled to receive it. In addition, if prime contractors decide to enter into or continue subcontracts with a subcontractor that DOL has advised needs a labor compliance agreement and the subcontractor is in disagreement with DOL, the prime contractor must inform the contracting officer (see FAR 52.222–59(c)(5) and (d)(4)). Also, the FAR text amended at 52.222–58(b)(2) and 52.222–59(f) states that "A contractor or subcontractor, acting in good faith, is not liable for misrepresentations made by its subcontractors about labor law decisions or about labor compliance agreements."

Comment: A respondent recommended that the FAR should require a prime contractor to consult with DOL if a subcontractor discloses labor law violations to the prime during contract performance. The respondent indicated that, if the subcontractor does not receive an updated clearance from DOL and the prime continues to retain the subcontractor, the prime should face the same action by the contracting officer as if the prime had committed the violation.

Response: The processes for subcontractor disclosures to DOL at FAR 52.222–59(c) and (d) are mandatory; however, the opportunity for a prime contractor to consult with DOL or an enforcement agency at FAR 52.222–59(e) is at the prime's discretion. The prime is responsible for evaluating any information it has, including labor compliance information received from DOL, when determining subcontractor responsibility. FAR 9.104–4(a) does provide that determinations of prospective subcontractor responsibility may affect the Government's determination of the prospective prime contractor's responsibility. The final rule is consistent with this policy. If prime contractors decide to enter into or continue subcontracts with subcontractors that DOL has advised need a labor compliance agreement and the subcontractor is in disagreement with DOL, the prime contractor must inform the contracting officer (see FAR 52.222–59(c)(5) and (d)(4)).

Comment: A respondent commented that an approach where DOL rather than the prime contractors would make the subcontractor responsibility determination would be equally problematic since the Government would, in effect, determine the subcontractor with whom prime contractors can do business. The respondent suggested that if DOL finds a subcontractor nonresponsible and the subcontractor's work was necessary to the prime contractor's supply chain, then the prime contractor may be forced to go out of business or not do business with the Government.

Response: The rule requires prospective subcontractors to submit labor law violation information to DOL, and requires DOL to develop an assessment. The DOL assessment assists prime contractors as they determine prospective subcontractor responsibility. Consistent with current practices under FAR 9.104–4(a), prime contractors determine subcontractor responsibility; the Government does not.

Comment: A respondent indicated that there could be conflicts of interest for DOL advisors when DOL analyzes a labor law decision issued by another part of DOL. This could also be problematic when State laws are implemented. The respondent recommended that the ALCA should be the moderator to avoid these conflicts of interest and the ALCAs should weigh in on recommendations with regards to State law violations.

Response: The structure of the subcontractor responsibility process does not create a conflict of interest, in and of itself. DOL Guidance clarifies that labor law decision information forthcoming from an enforcement component of DOL will be assessed objectively. Administrative decision makers enjoy a presumption of honesty and integrity. See *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975).

Comment: Another respondent suggested that DOL issue subcontractors a certificate of competency for labor law violations, so that prime contractors can be assured that any issues have been reviewed by the most trained and appropriate subject matter experts.

Response: DOL has the most trained and appropriate subject matter experts and will provide an assessment of a subcontractor's labor law violations. There is no need for the requested certificate of competency. The subcontractor is responsible for communicating the results of the DOL assessment to the prime. The prime may rely on this information in reaching a conclusion as to a subcontractor's responsibility. In addition, DOL encourages companies to work with DOL and other enforcement agencies to remedy potential problems independent of the procurement process so companies can give their full attention to the procurement process when a solicitation of interest is issued (See DOL Guidance Section VI, Preassessment).

Comment: One respondent agreed with the FAR Council's proposed Supplemental Alternative which required that a contractor's compliance with a labor compliance agreement be factored into the evaluation of a contractor's performance. The respondent indicated this does not go far enough, and should provide that contracting officers and ALCAs must consider such compliance and factor it into both the contractor's future responsibility reviews and its past performance evaluations. In addition, the respondent stated that the contracting officer should not be permitted to credit whether the prospective contractor is still in good faith negotiating such an agreement as a mitigating factor under FAR 22.2004–3(b)(2) or (3)(v) unless such delay is directly attributed to specific Government action or inaction. The respondent stated that this standard would otherwise provide a disincentive for employers to promptly enter into a labor compliance agreement.

Response: The FAR currently provides a contracting officer with broad discretion in determining the suitability of the prime contractor. In addition, language has been added to the final rule, as described in the summary of this section, to include consideration of labor law violations in past performance evaluations (see FAR 42.1502(j)).

Comment: Respondents objected to the requirement that contractors must disclose labor law decision information every six months during the life of the contract for the Government to evaluate whether contract performance under an existing contract should continue, and contended that this would be akin to a determination of nonresponsibility. They asserted that current FAR requirements do not provide that the Government will automatically terminate an existing contract when there has been a violation, even where the violation has led to a debarment or suspension of the contractor. Indeed, Government contacts generally continue. Respondents noted that a process that disrupts a contract that is being properly and timely performed would hinder the Government's ability to carry out its mission. They suggested that the approach embodied in the proposed rule marks a significant shift in how the Government procurement process operates, and that such a fundamental shift is neither required nor justified to implement the E.O. and may lead to legal action.

Response: FAR 52.222–59(b) requires the contractor to update disclosed labor law decision information. An update of the contractor's information does not automatically result in a decision by the contracting officer to terminate the contract. Rather, the updated information is considered by the contracting officer in making contract decisions such as whether contract remedies are warranted or whether to exercise an option (see FAR 22.2004–3(b)(4)). This is consistent with current practice and no change to the rule is warranted.

b. Alternatives for Implementation of Disclosures That Were Not Presented in the Proposed Rule

Comment: A respondent suggested using existing disclosure and reporting requirements in the FAR to satisfy requirements under the E.O.

Response: The existing FAR does not require disclosure and reporting requirements for the fourteen labor laws and equivalent State laws in the E.O. The E.O. addresses more than just disclosure and reporting requirements; for clarity, the Councils have determined to implement the E.O. through a separate subpart in the FAR, consistent with how the Councils have implemented other statutes and E.O.s of this scale.

Comment: A respondent recommended limiting the rule's disclosure and reporting requirements for subcontracts only to first-tier subcontracts, as defined at FAR 52.204–10, in order to avoid application to a contractor's supplier agreements with vendors. This change would exempt long term arrangements for materials or supplies that benefit multiple contracts and/or related costs that are normally applied to a contractor's general and administrative expenses or indirect costs.

Response: The Councils decline to limit applicability of disclosure and reporting requirements to only first-tier subcontracts, as that term is defined in FAR 52.204–10. In addition, the Councils decline to exclude long-term supplier agreements. The E.O. provides no exclusion for lower-tier subcontracts, for non-COTS items, or for supplier agreements. However, the exemption for COTS items, and the $500,000 and above threshold, should minimize the number of supplier agreements with small businesses that are covered by the E.O.

Comment: A respondent stated that contractors should be required to obtain a responsibility recommendation from DOL concerning subcontractors prior to making a subcontractor responsibility determination.

Response: DOL, as an enforcement agency, does not perform responsibility determinations or make recommendations on the responsibility determination. DOL makes assessments of labor law violations to inform the contractor's consideration of such information when the contractor is making its subcontractor responsibility determinations (FAR 52.222–59(c)(4)(ii)). The final rule, like the proposed rule, provides at FAR 52.222–59(e) that the prime contractor may consult with DOL for advice, as appropriate, regarding assessment of subcontractor labor law violation information.

Comment: A respondent requested that the Councils establish new affirmative prequalification procedures, or affirmative job-to-job certification standards, for bidders and subcontractors on contracts valued at more than $500,000, that will require offerors to attest that they do not have any of the labor law violations specified by the E.O. in order to qualify to bid or participate on a project. The respondent commented that the disclosure provisions will not effectively remove contractors with substantial histories of labor law violations from the Federal procurement process.

Response: The Councils view the proposed disclosure provisions as sufficiently rigorous. Having a labor law violation is not an automatic bar from doing business with the Government. The information disclosed will be assessed in accordance with the requirements of this rule and the contracting officer is responsible for making a determination of responsibility before awarding a contract.

Comment: A respondent expressed concern about subcontractor monitoring by higher-tier contractors and recommended that contractors be required to submit all disclosure information received from potential subcontractors to the contracting officer, who, in consultation with the ALCA, should assess the subcontractor's responsibility as part of the assessment of the prime. Otherwise, the respondent stated, there would be almost no Government oversight of subcontractors' compliance with labor laws.

Response: The final rule has been revised to require subcontractors at all tiers to disclose labor law decisions to DOL, so that contractors can obtain the advice of DOL on labor law decisions (and mitigating factors and remedial measures) in formulating subcontractor responsibility decisions. The Councils do not support requiring the submission of all labor law violations regarding subcontractors to the contracting officer, as the prime contractor is responsible for determining subcontractor responsibility (see FAR 9.104–4(a)).

Comment: A respondent recommended that the 3-year reporting period be changed to a less-burdensome, rolling 12-month period under which contractors would be required to report only labor law violations occurring within the preceding 12 months which are serious, repeated, willful and pervasive.

Response: As stated in the summary, the reporting period for disclosing decisions relating to violations of labor laws is being phased in; the period begins on October 25, 2015 and runs to the date of the offer, or for three years preceding the offer, whichever period is shorter.

Comment: A respondent recommended a "fast-track" approach for low risk violations that would not activate the E.O.'s remedial process and would permit contracting officer discretion to proceed with a responsibility determination for matters that properly fit into the low risk categories. This approach could involve consulting the ALCA, but without the remedial process being activated.

Response: Violations must undergo the analysis process to determine whether they are low-risk. The process in the final rule requires the ALCA to assess the labor law violations; the contracting officer considers the ALCA's analysis. No revisions are necessary.

Comment: Respondents expressed concerns about the proposed rule being applied retroactively to existing contracts. One respondent recommended that the rule prohibit retroactive application of the rule through modification of existing contracts, including multiple year IDIQ contracts with less than 3 years remaining, and prohibit contracting officers from making option exercise contingent on agreement to adopt new clauses.

Response: The rule will not apply to existing contract options for contracts which do not contain the FAR 52.222–59 clause. As discussed in the summary, the Councils have implemented a phase-in of contract and subcontract disclosure requirements. Neither the E.O. nor the final rule provides for retroactive application of the disclosure requirements to existing contracts. Companies will be brought into the labor law decision disclosure process with their first new contract issued after this rule is effective. There is no need for the Councils to make the rule applicable to contracts awarded before the rule, nor is it necessary to risk voiding the Government's right to exercise a unilateral option by attempting to add these clauses to an existing contract. No changes to the final rule are necessary. The Councils note that companies with a basic disregard for labor laws, without a satisfactory record of integrity and business ethics, may be found nonresponsible, whether or not the disclosure process is in effect.

c. Recommendations for Use of Existing Data or Employing Existing Remedies

Comment: A respondent, echoing the view of many of respondents, suggested using existing reporting and disclosure systems and processes instead of creating new ones. The respondent commented that the proposed rule is unnecessary to meet the Government's stated objectives of economy and efficiency in procurement because the Government has procedures already in place to ensure that it contracts only with responsible parties, which include the consideration of labor law violations. The respondent stated that the proposed reporting and disclosure requirements will duplicate information already in the Government's possession thus placing a reporting burden on contractors that outweighs the benefits. Several respondents suggested that Federal agencies use existing, adequate suspension and debarment processes to root out bad firms rather than create a new and burdensome regulatory scheme for that purpose.

Response: DOL's existing systems were established in the past for a different purpose and do not satisfy the current needs of the Government in meeting the objectives of the E.O. As explained in the Preamble to DOL's Guidance, DOL and other enforcement agencies are actively working to upgrade their current tracking systems for use by the Government in compiling and maintaining enforcement data and contractor-disclosed data for purposes of implementation of the E.O. Enforcement agency databases do not and will not collect labor law decision data on arbitral awards or decisions or civil judgments in private litigation. Thus, disclosure of labor law decisions contemplated under the E.O. will necessarily include some level of disclosure by contractors. Like all information collections, the collections established to meet the requirements of this final rule will be reviewed periodically and revised accordingly when Government systems are better able to meet the terms of the E.O. See the RIA for discussion on costs and benefits of the rule. Also see Section III.B.1. of this publication and DOL Preamble Section V, paragraph D(1), which discusses the explanation for the E.O. meeting the stated objectives of increasing economy and efficiency.

Comment: A number of respondents objected to the proposed disclosure and reporting requirements as unnecessary because DOL and other agencies already have the authority to take action against violators and track violators. These respondents commented that the proposed rule would shift the burden and expense traditionally borne by the Government to Federal contractors and subcontractors, and asserted that private and public resources should not be spent filing the proposed reports when the Government already has sufficient data on whether offerors have labor law violations. A respondent commented: (1) The protections sought by the proposed rule already exist in statutes and regulations that contain civil and/or criminal penalties for contractors who violate the labor laws and prevent egregious violators from receiving contracts, referencing the FLSA, the OSH Act, Title VII of the Civil Rights Act of 1964, and the debarment authority of labor laws such as the Service Contract Act (SCA) and the Davis-Bacon Act (DBA); (2) the Councils could dispense with the proposed contractor reporting system and instead improve the Government's information collection and dissemination mechanisms and processes because the agencies which enforce the labor laws listed in the E.O. already possess the information that contractors would be required to report and the current process will work more efficiently at a fraction of the cost of the proposed rule; and (3) contracting agencies can gather information about a contractor's Federal labor law compliance history by visiting DOL's Web site and the federal courts' public access docketing viewer (commonly referred to as "PACER").

Response: The response to the prior comment addresses the limits of utilizing the existing enforcement agency system capabilities versus requiring contractor disclosure. See also the discussion of economy and efficiency and authority challenges at Section III.B.1. of this publication.

Comment: Several respondents indicated that the Government has FAPIIS for compiling contractor data for purposes of informed responsibility determinations based on a contractor's satisfactory record of integrity and business ethics, which includes provisions allowing agencies to impose exclusions for labor law violations. Respondents noted that it is a robust system for determining whether to award contracts to entities, including the discretion not to award a contract if the entity has an unsatisfactory labor record. Respondents pointed out that the rule should focus on modifications and improvements to those Federal systems, rather than impose a reporting requirement on Federal contractors.

Response: The E.O. provides a mechanism, implemented in this final rule, for contracting officers and contractors to gain access to labor law decision information of offerors and prospective subcontractors, including mitigating factors and remedial information, so that it may be considered when making responsibility determinations of offerors and subcontractors. This information is not otherwise available.

Comment: A respondent stated the proposed rule confuses contracting officers' authority to make determinations of responsibility with Governmentwide exclusion determinations made by suspension and debarment officials, causing duplication of roles and inconsistent treatment under labor laws. The respondent stated that by giving contracting officers tasks that belong to suspension and debarment officials, the proposed rule is inconsistent, incompatible, and duplicative of existing systems, and undermines the fairness and due process protections established within the suspension and debarment process.

Response: A contracting officer finding of nonresponsibility relates to the contractor's capability of performing a particular procurement. In contrast, the suspension and debarment process is based upon the conclusion that a contractor is so lacking in integrity or business ethics such that no contract award is in the Government's interest. The Councils do not consider a change to be necessary.

Comment: Many respondents commented that the existing, proven suspension and debarment system should be used in response to contractors who have serious, repeated, willful, and/or pervasive labor law violations instead of creating an overly burdensome and costly additional process. Respondents stated: (1) It is fairer to allow a negative Federal contracting determination only according to the established due process-protected procedures found in the suspension and debarment process; and (2) Federal labor law and Federal procurement practices already strongly support not awarding Federal contracts to employers who deny workers basic rights and Federal agencies have sufficient authority with suspension and debarment-exclusion practices.

Response: While the Councils agree that suspension and debarment is an appropriate remedy in certain instances when labor law violations occur, it may not be the appropriate vehicle to be used in most instances of contractor labor law violations. A contractor may be able to enter into a labor compliance agreement or otherwise remedy its labor law violations, and still be eligible for future awards.

The final rule also provides that when a contractor discloses labor law decisions, when being considered for contract award, it has the opportunity to provide remedial measures and mitigating factors for Government consideration.

The final rule also provides that the ALCA or the contracting officer may notify agency suspending and debarring officials.

d. Alternatives Suggested for the Threshold for Dollar Coverage for Prime Contracts

The disclosure of labor law decisions by prime contractors applies to prime contracts over $500,000; see FAR 22.2007(a) and (c) and 52.212–3(s). For paycheck transparency, the application is also to prime contracts over $500,000; see FAR 22.2007(d). For arbitration, the application for prime contracts is over $1,000,000 for other than commercial items; see FAR 22.2007(e).

Comment: Some respondents stated that the $500,000 applicability threshold is too low and will slow down the contracting process for both the Government and prime contractors, have a disparate impact on small business, and should be modified. In contrast, other respondents believed the individual contract threshold of $500,000 is too high. One wanted more contracts covered to highlight the importance of safety issues. Another respondent cautioned that contractors with significant labor law violations but no single contract or subcontract over the $500,000 threshold will be exempted from the intent of the E.O.

Response: The $500,000 threshold is explicitly stated in the E.O. Lowering the threshold would further increase the burden on the public. Raising the threshold would eliminate a significant number of prospective contractors and subcontractors from application of the E.O.

Comment: Respondents commented on the applicability of the rule to task and delivery orders and Federal Supply Schedules (FSS), Governmentwide Acquisition Contracts (GWACs), and Multi-agency Contracts (MACs). One suggested that the rule clarify that it does not apply to the award of task orders and delivery orders. Another asked whether the required notices in FAR 52.222–59(c) and (d) would go to the agency with the contract, or the agency that issued the order.

Response: While the value of expected task and delivery orders may be relevant for the "estimated value" of a base contract for the purpose of reaching the relevant dollar threshold (*e.g.*, $500,000), the issuing of an individual task or delivery order does not independently trigger any of the E.O.'s requirements. Requirements of the solicitation provision FAR 52.222–57 will apply to solicitations for new base contracts, including indefinite-delivery contracts, FSS, GWACs, and MACs. Representations and disclosures required at the time of determination of responsibility will occur prior to the base contract awards. Representations and disclosures required at the time of determination of responsibility are not required again when a task or delivery order is awarded against an indefinite-delivery base contract. Existing base contracts that do not contain the FAR subpart 22.20 requirements are not subject to the disclosure requirements of this rule; this includes those existing base contracts that pre-date the effective date of the disclosure requirements, but which may have subsequent task and delivery orders issued after the effective date of the disclosure requirements. This practice is standard for application of clauses in the FAR. If the FAR were to specify this practice in one part or subpart, it would create an ambiguity on overall applicability. Therefore, no clarification is needed to the rule. The disclosures required by FAR 52.222–59(c)(5) and (d)(4) are made to the contracting officer for the base contract. Existing contractors gradually will be brought under the rule's requirements as new contracts are awarded.

e. Threshold for Subcontracts

The disclosure of labor law decisions by subcontractors applies to subcontracts over $500,000 for other than COTS items; see FAR 52.222–58 and 52.222–59(g). For paycheck transparency, the application is also to subcontracts over $500,000 for other than COTS; see FAR 52.222–60(f). For arbitration, the application is to subcontracts over $1,000,000 for other than commercial items; see FAR 52.222–61.

Comment: Some respondents stated that subcontracts for commercial items and COTS should not be exempt from the labor law decision disclosure requirements of the rule, because COTS and commercial item subcontractors are just as prone to labor law violations, and that this exemption will weaken the rule. On the other hand, some respondents believed that subcontracts for commercial items should be exempt in the same manner subcontracts for COTS items are.

Response: The E.O. limited the subcontractor disclosure exemption to COTS in order to balance the objectives of the E.O. with minimizing the burden it places on contractors. The Councils agree that this approach is an appropriate balance and no change is made to the rule.

Comment: One respondent objected to the COTS exemption for subcontracts under paycheck transparency (FAR 52.222–60) and the commercial item exemption for arbitration (FAR 52.222–61).

Response: The E.O. restricted the subcontractor disclosure exemption to COTS in order to balance the objectives of the E.O. with minimizing the burden it places on contractors. The Councils agree that this approach is an appropriate balance and no change is made to the rule.

Comment: Some respondents stated that applicability of the rule to subcontractors should not be delayed.

Response: Providing a phase-in period for subcontractors will allow both prime contractors and Government personnel to understand the new requirements, develop processes, and focus resources needed for execution. Therefore the Councils have adopted a one year phased implementation approach (see introductory summary in Section III.B.2.a. above), whereby initial implementation applies to prime contractors, later followed by subcontractors.

Comment: Several respondents, including the SBA Office of Advocacy, were concerned about the effects that applicability of the rule may have on small businesses. They suggested applicability to subcontracts be minimized, for example, by raising the threshold from $500,000 to $1,000,000, and indexing it to inflation.

Response: The E.O. considered impacts to small businesses and by design has taken steps to minimize the burden on small businesses, by exempting the majority of Federal contract awards to small businesses, namely, contracts valued under $500,000 and subcontracts for COTS items. Therefore, no change is being made to the rule.

41 U.S.C. 1908 provides for inflation indexing; however, that statute does not provide for increasing E.O. thresholds.

f. Applicability to Prime Contracts for Commercial Items

For prime contractors the disclosure of labor law decisions and coverage of paycheck transparency do not exclude contracts for commercial items or COTS. For arbitration, the application for prime contracts excludes contracts for commercial items. See prescriptions at FAR 22.2007, and see 52.212–3.

Comment: Respondents expressed opposition to the rule, claiming that the exemption for COTS subcontracts should be extended to COTS prime contracts. In the respondents' view, applying the rule to prime contractors may drive commercial companies out of the Federal marketplace, particularly nontraditional, innovative suppliers. Some respondents would expand the exemption to all contracts for commercial items.

Others expressed the view that the final rule should not contain an exemption for COTS or for commercial item contracts. In their view, the quality of responsibility determinations should not depend on the type of item being purchased.

Response: The E.O. considered impacts to contractors and subcontractors who provide commercial items and COTS. The E.O. limited the COTS exemption to subcontractor disclosure, in order to minimize the burden it places on subcontractors, while still meeting the objectives of the E.O. The E.O.'s approach is an appropriate balance in applying the exception for COTS to subcontractors and not to prime contractors.

Comment: A respondent pointed out that the Federal Acquisition Streamlining Act of 1984 (FASA) was designed to make Federal contracts for commercial items more consistent with their commercial counterparts in order to encourage the commercial entities to enter the Federal marketplace and the Government to purchase more commercial items. Citing section 8002 of FASA, the respondent pointed out that "contracts for the acquisition of commercial items must include only those clauses that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items or that are determined to be consistent with customary commercial practice to the maximum extent practicable." Noting that the FAR contains similar requirements, the respondent inferred that the E.O. is inconsistent with statute to the extent it "deters commercial item contractors from participating in the Government market."

Response: The E.O.'s goal is to contract with responsible parties who have a satisfactory record of integrity and business ethics; this is consistent with commercial practices. While there are aspects of the rule that fall outside customary commercial practices (*e.g.*, disclosures of labor law violations), its provisions and clauses fall within FAR 12.301(a)(1) as "[r]equired to implement provisions of law or executive orders applicable to the acquisition of commercial items." The E.O. was intended to cover commercial item contracts; it specifically exempted COTS subcontracts but not commercial item contracts. As a result, the Councils find the inclusion of the provisions and clauses consistent with law, regulation, and the E.O.

g. Miscellaneous Public Comments Concerning Alternatives

Comment: Some respondents wanted to retain the disclosure requirement for labor law violations occurring on nonGovernment work. Other respondents wanted coverage limited to work under Government contracts or to business units that do business with the Government. Their rationale for coverage limited to Government contracts was that if the reported labor law violations relate to performance under a Government contract, these matters may be properly addressed under applicable FAR subpart 42.15, Past performance information; there is no need to impose redundant reporting obligations. Additionally, if the reported labor law violations do not relate to past performance under a Government contract, they reasoned that such information would not necessarily be relevant to a contractor's or subcontractor's ability to successfully perform a specific Government contract, and consideration should instead be determined in accordance with the established suspension and debarment procedures set out in FAR subpart 9.4.

Response: The rule covers the legal entity's full record, including private sector work. The particular information that a contracting officer may need to make a responsibility determination will be specific to the circumstances of a given contract. Rather than predetermine what information a contracting officer must use, the rule provides the information that will allow a contracting officer to make a considered responsibility determination.

Violations of the labor laws listed in Section 2 of the E.O., particularly in instances where the violations are serious, repeated, willful, and/or pervasive, may specifically affect whether a contractor has a satisfactory record of integrity and business ethics, and may also negatively impact a contractor's ability to meet other standards established in FAR 9.104–1. There is a direct nexus between labor law violations and whether a contractor has a "satisfactory record of integrity and business ethics" as required by FAR 9.104–1(d). See, *e.g.*, Gen. Painting Co., B–219449, Nov. 8, 1985, 85–2 CPD ¶ 530.

This nexus is explicitly cited in the E.O. at Section 2(a)(iii): "In consultation with the agency's Labor Compliance Advisor, contracting officers shall consider the information provided . . . in determining whether an offeror is a responsible source that has a satisfactory record of integrity and business ethics. . . ." Further, as stated in Section 1 of the E.O., the President has concluded that "[c]ontractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government. Helping executive departments and agencies . . . to identify and work with contractors with track records of compliance will reduce execution delays and avoid distractions and complications that arise from contracting with contractors with track records of noncompliance."

Satisfactory record of performance and ability to comply with the required delivery or performance schedule are expressly included among the list of standards in FAR 9.104–1, which a prospective contractor shall meet to be determined responsible.

The E.O. provides that, in making a responsibility determination prior to award, the contracting officer should consider all reported labor law violations in determining whether a prospective contractor is a responsible source that has a satisfactory record of integrity and business ethics. This consideration should not be limited only to reported violations that have occurred during the performance of prior Federal Government contracts, but should also include violations that have occurred outside the performance of Federal Government contracts. Consideration of all reported labor law violations, whether related to Federal contracts or not, provides insight into how the prospective contractor will perform during a future Government contract. Evidence of a prospective contractor's past labor law decisions concerning labor law violations is a basis to inquire into that contractor's potential for satisfactory labor law compliance; furthermore, how the prospective contractor has handled past violations is indicative of how it will handle future violations. When a prospective contractor has a record of noncompliance with labor laws, the contracting officer should consider the impact that likely future noncompliance will have in terms of the agency resources that will be required to monitor the contractor's workplace practices. Also see discussion in Section III.B.1.b. above.

Comment: Several respondents recommended that the rule provide an exemption or other mechanism for a prime contractor to enter into a contract with a subcontractor, notwithstanding its labor law violation history, in the case of contingency, urgency, compelling need, or an agency-directed subcontract.

Response: The rule requires contractors to consider a prospective subcontractor's labor law decision information as part of its responsibility determination, but it does not preclude a contractor proceeding with a determination in the case of contingency, urgency, or compelling need, even if the subcontractor has labor law violations. The FAR text at 52.222–59(c)(2), (c)(5) and (c)(6) has been revised to reflect how some of these circumstances may be handled.

Comment: A respondent recommended creation of an exemption, for urgent needs, to the rule's requirement for contracting officers to consult with labor compliance advisors.

Response: There is no need for an exemption for urgent needs because under the existing rule text, the contracting officer can set the timeframe for an ALCA's response and absent a response can move forward with a responsibility determination (see FAR 22.2004–2(b)(2) and (b)(5)(iii)).

Comment: Respondents commented that the reporting requirement for initial and subsequent semiannual reporting conflicts with information restrictions associated with classified contracts. They recommended that the rule be revised to accommodate classified contracts, and that public comments be requested on this issue. The recommendation was to protect information relating to classified contracts, and classified information. Respondents pointed out that sometimes the identity of the contracting agency and the contractor are classified, and that the issue can arise at prime and subcontract levels.

Response: The rule does not compel the disclosure of classified information.

3. Requirements for Disclosures of Labor Law Decisions

Introductory Summary: The Councils received a number of comments related to disclosures associated with the proposed rule. Particular comments related to scope of information provided, potential liability, need for disclosure, public availability of information, semiannual updates, and reporting entity, among others.

The Councils recognize the E.O. and final rule contain a range of new requirements for contractors, subcontractors, and the Government. As such, the Councils have been mindful in attempting to minimize impacts while meeting the objectives of the E.O.

In response to the comments, the Councils have:

- Clarified in the final rule at FAR 52.222–59(b) that the semiannual update does not have to be accomplished on a contract-by-contract basis.
- Clarified in the final rule at FAR 52.222–57(a)(2) that if the offeror is a joint venture that is not itself a separate legal entity, each concern participating in the joint venture must separately comply with the representation and disclosure requirements.

a. General Comments

Comment: A respondent expressed general support for contractor disclosures of labor law violations, stating that the contractor is in the best position to furnish complete and accurate records about its labor law violations.

Response: Noted.

Comment: A respondent recommended that a list of companies (both contractors and subcontractors) that have been precleared or cleared in prior responsibility determinations and the dates of those clearances be made publicly available. The respondent further recommended that a list of companies under ongoing responsibility investigations should be made publicly available and promptly updated so that worker representatives and advocates, community groups, and other relevant interested parties may provide input. The respondent indicated that such publication would assist contractors in choosing precleared subcontractors, enhancing the efficiency and speed of the subcontracting approval process.

Response: The E.O. and the FAR implementation require public disclosure of labor law decision information in FAPIIS (*i.e.*, labor law violated, case number, date rendered, name of the body that made the determination or decision). For each contract or subcontract award, a responsibility determination is fact-specific and the assessment of integrity and business ethics is but one factor that is taken into consideration. A previous finding of responsibility does not indicate present responsibility for the particular procurement. As such, the Councils decline to adopt a requirement to establish a precleared or cleared process for contractors previously found responsible on other contracts and make such information publicly available. Nevertheless, in accordance with DOL's Guidance, contractors do have the ability to address their labor law compliance with DOL, in advance of any particular procurement, to enhance the efficiency of the procurement process (see DOL Guidance Section VI, Preassessment).

Comment: Respondents made recommendations to increase transparency when prospective contractors were undergoing responsibility determinations and investigations so that interested parties could provide input. For example, respondents recommended that unions or a contractor's employees be permitted to report labor law violations directly to a contracting agency. To facilitate such reporting, the respondents suggested that a prospective contractor be required to notify unions and its employees at a prospective contract performance location of the opportunity to report violations and of whistleblower protections. Respondents further recommended that a list of companies where there are ongoing responsibility investigations be made publicly available and promptly updated so that worker representatives and advocates, community groups, and other relevant interested parties may provide input.

Response: Sources having knowledge of labor law violation information are encouraged to provide it to DOL and the enforcement agencies in a timely manner and not wait for agency procurement actions. The Councils decline to make such information public as doing so is outside the scope of the E.O.

Comment: Respondents recommended changing the scope of required disclosures. Some recommended expanding the disclosures to include information such as remedies and number of workers affected. One recommended including violations older than three years. Others recommended that disclosure not be required for nonfinal, nonmaterial, or technical violations, for violations arising on nonGovernment projects, or for citations that might be settled or withdrawn.

Response: Expanding the disclosures to require the submission of additional information would create an increased burden on contractors. Moreover, contracting officers have an existing duty under the FAR to obtain such additional information as may be necessary to be satisfied that a contractor has a satisfactory record of integrity and business ethics (see FAR 9.104–1(d)), and contractors must provide the labor law decision documents to contracting officers upon request (see FAR 22.2004–2(b)(2)(iii), 52.222–57(d)(1)(ii), 52.222–59(b)(2)).

Comment: A respondent recommended creating a safe harbor framework to permit contractors and subcontractors found not to be responsible back into the marketplace.

Response: Responsibility determinations are conducted on a contract-by-contract basis. A finding of nonresponsibility on a specific contract does not remove the contractor from the marketplace or bar a contractor from bidding on or receiving future contracts. Furthermore, the labor law violation information that informs the assessment of integrity and business ethics is but one factor that is taken into consideration in making a responsibility determination.

Comment: A respondent recommended that copies of administrative merits determinations, civil judgments, and descriptions of violations be available publicly.

Response: The final rule, consistent with the proposed rule, compels public disclosure of certain basic information, *i.e.*, whether offerors do or do not have labor law decisions rendered against them concerning violations of covered laws, and, for prospective contractors being assessed for responsibility, certain basic information about the violation. The FAR implementation requires that the basic information be input in SAM and be publicly disclosed in FAPIIS. See FAR 52.222–57(d). Other contractor information submitted to the Government under this rule is not automatically available, and release is covered in FAR 9.105–3, FAR part 24, and agency policies issued pursuant to the Freedom of Information Act (FOIA). A contractor which submits mitigating factors and remedial measure or other explanatory information into SAM may determine whether the contractor wants this information to be made public. See FAR 22.2004–2(b)(1)(ii) and 52.222–57(d)(1)(iii).

Comment: Respondents voiced concerns about keeping representations current given a long solicitation lead time. For example, a respondent observed that contractors would need to update representations right up to the award date, which could be several months after the offer date. Another respondent commented that contractors will need to update the reporting system at the System for Award Management (SAM) so that the agencies have the most current information available, which is especially important if there is a long gap between offer and award.

Response: The offeror must notify the contracting officer of an update to its representation (see FAR 52.222–57(e)) if the offeror learns that its representation is no longer accurate. This means that if an offeror represented at FAR 52.222–57(c) that no labor law decisions were rendered against it, and since the time of the offer the offeror now does have a labor law decision rendered against it, the contractor must notify the contracting officer. The reverse is also true: If for example, an offeror made an initial representation that it has a labor law decision to disclose, and since the time of the offer that labor law decision has been vacated by the enforcement agency or a court, the contractor must notify the contracting officer. In the process of making a responsibility determination, the contracting officer may obtain additional information from a contractor in accordance with FAR 9.105.

Comment: Respondents were concerned that the rule would reduce or increase contractors' incentive to settle labor citations, *e.g.*, in order to attain a favorable responsibility determination.

Response: The objective of the E.O. is to increase the focus on compliance with labor laws. Studies cited in the proposed rule link compliance with labor laws to favorable performance. Therefore, it is assumed that such consideration may alter certain aspects of contractor behavior. With regard to attaining a favorable responsibility determination: The assessment of integrity and business ethics is fact-specific and labor law compliance is but one factor that is taken into consideration in making a contractor or subcontractor responsibility determination.

Comment: One respondent recommended that subcontractors be permitted to file disclosures of labor law violations directly with the Government through SAM.

Response: SAM registers contractors intending to do business with the Federal Government, not their subcontractors. In consideration of public comments, the Councils have revised the final rule at FAR 52.222–59(c) and (d) to incorporate the alternative presented in the proposed rule, whereby subcontractors provide their labor law decision disclosures to DOL, in lieu of to the prime contractor (see DOL Guidance Section V).

b. Semiannual Updates

Comment: Several respondents recommended that the required labor law violation disclosure update reporting be consolidated on an annual or semiannual basis, based on a date chosen by the contractor and subcontractor. There was concern that contractors holding many covered contracts and subcontracts will find themselves gathering information and submitting information on a near-constant basis.

Response: There is no requirement for the information in SAM to be updated separately on a contract-by-contract basis. The Councils agree that the term "semiannual" as used in the proposed rule was subject to different interpretations. In the final rule, the Councils clarify that contractors have flexibility in establishing the date for the semiannual update; they may use the six-month anniversary date of contract award, or may choose a different date before that six-month anniversary date to achieve compliance with this requirement. In either case, the contractor must continue to update it semiannually. Registrations in SAM are required to be current, accurate, and complete (see FAR 52.204–13). If the SAM registration date is less than six months old, this will be evidence to the Government that the required representation and disclosure information is updated and the requirement is met.

Comment: A respondent recommended that the proposed rule require the reporting of the following additional information about administrative merits determinations, arbitral awards, or civil judgments in the postaward semiannual disclosure updates, in SAM and directly to the contracting officer: (a) Labor law violated; (b) docket number; (c) name of the adjudicating body; (d) short factual description of the violation; (e) remedies imposed including monetary amount; (f) number of workers affected; (g) current status of the case; (h) copy of the determination, arbitral award, or civil judgment; (i) copy of any applicable labor compliance agreement or remediation agreement; (j) any notice from DOL advising that the subcontractor either has not entered into a labor compliance agreement within a reasonable period of time or is not meeting the terms of an existing agreement.

The respondent indicated that requiring the contractor to provide such information and documentation directly to the contracting officer would enable the ALCA to more efficiently and expeditiously assess the contractor's labor law compliance and to recommend appropriate action to the contracting officer.

Response: The scope of the required disclosure is delineated in the E.O. The E.O. required DOL to define the terms "administrative merits determination", "civil judgment", and "arbitral award or decision". The definitions of these terms further delineate the scope of required disclosure and the FAR rule adopts these definitions. Expanding the disclosures to allow for the submission of additional information is outside of the E.O. and DOL Guidance, creates an increased burden on contractors, and will additionally complicate the review process.

c. Burden of Disclosing Labor Law Decisions

Comment: Several respondents commented that the proposed rule adds unnecessary regulatory burdens and risks that serve as a disincentive for companies considering entry into the Federal market or may cause companies to leave the Federal market entirely.

Response: The Federal procurement process works more efficiently and effectively when contractors and subcontractors comply with applicable laws, including labor laws. The Councils recognize that implementation of the E.O. does have associated disclosure requirements, but the final rule is designed to meet the E.O. objective of promoting compliance with labor laws while minimizing burden where possible.

Comment: Respondents, including the SBA Office of Advocacy, expressed concern that the disclosure process, the frequency of disclosures, and review process is very burdensome and costly for all. They suggested that the burden could weigh more heavily on the small business community. One respondent stated that the onerous reporting requirements run counter to the Administration's commitment to reduce burden in commercial items acquisitions and recommended that the Government streamline the reporting process by exempting commercial items.

Response: The E.O. does not exempt small businesses or commercial items, which are significant components of the Federal marketplace. However, to minimize burden, the E.O. disclosure requirements are limited to contracts over $500,000 and subcontracts over $500,000 other than COTS items. This disclosure threshold excludes the vast majority of transactions, many of which are set aside and performed by small business. Also see the discussion of phase-in at section III.B.2.a. above.

Additionally, the Councils have adopted the alternative approach whereby subcontractors provide their labor law decision information (and mitigating factors and remedial measures) to DOL and revised FAR 52.222–59(c) and (d) to incorporate this alternative. This approach will further reduce prime contractor burden. The final rule has been revised to delete reporting language that specified updates "throughout the life of the contract." Likewise, to minimize the impact of the rule, the Councils clarify that contractors have flexibility in establishing the date for the semiannual update; they may use the six-month anniversary date of contract award, or may choose a different date before that six-month anniversary date to achieve compliance with this requirement. In either case, the contractor must continue to update the disclosures semiannually.

The revised language should provide contractors with more flexibility for compliance with the semiannual requirement.

Comment: A respondent expressed concern that if the rule is tailored to mostly exempt small businesses, higher tiered contractors will have to absorb all risk related to labor law violations by small business suppliers.

Response: The E.O. disclosure requirements are limited to contracts and subcontracts over $500,000. This threshold minimizes the impact and burden by exempting contracts and subcontracts under $500,000, but the risk level of subcontracting with suppliers with labor law violations does not change. Under current practice, higher-tiered subcontractors must subcontract with responsible firms and set the terms and conditions of their subcontracts.

Comment: Respondents stated that contractors will have to make significant investments to deal with the complexity of complying with disclosures. In addition to understanding the various statutes and executive orders, contractors will need to master the definitions and terminology outlined in the FAR and the DOL Guidance. The respondents surmised that contractors will expand their compliance departments and much of the expense will get passed on to the Government.

Response: The Government and contractors will have to establish disclosure procedures, processes, practices, and tracking mechanisms commensurate with their size and organizational structure. However, this information is necessary to provide a clear and accurate picture of past labor law violations to comply with the E.O. requirements.

Comment: Respondents commented that the complexity of the proposed rule and new requirements will burden Federal contracting agencies that will have to create a new bureaucracy of advisors to counsel contracting officers, contractors, and subcontractors on the intricacies of the new rules. Respondents noted that each time a contractor reports labor law violations, contracting officers will be required to make determinations.

Response: The rule will impose additional requirements on the Government. These efforts are necessary to meet the policy objectives of the E.O. and to help inform procurement decisions made by the contracting officer before contract award and during contract performance, and enhance the Government's ability to contract with those having a record of integrity and business ethics. DOL will create processes that facilitate coordination between ALCAs and DOL, which will minimize the burden for agencies by avoiding redundant and inconsistent analysis.

Comment: Many respondents commented that the proposed rule and DOL Guidance will create onerous data collection and reporting requirements. They expressed that most companies do not have systems in place that routinely track whether there have been any administrative merits determinations, arbitration decisions, or civil judgments against them. In addition, most companies would not track such actions because they may not be final and are reversible. These respondents remarked that in order to comply, contractors would need to create new databases and collection mechanisms, develop new internal policies and procedures, and hire and train new personnel to ensure compliance with the proposed requirements.

Response: The Councils recognize that the rule creates reporting requirements for which contractors and subcontractors may need to establish systems, processes, and procedures, including for primes to manage their subcontractors' compliance with the rule's requirements. Each contractor and subcontractor will determine the size and complexity of the processes, procedures, and tracking and/or collection mechanisms necessary to meet its obligations under the rule.

Comment: Respondents stated that reporting potentially nonfinal administrative merits determinations, arbitration decisions, or civil judgments under the proposed FAR rule bears no traditional nexus between labor law violations and traditional notions of responsibility which are for a particular procurement and performance of a Government contract. They suggested that narrowing the reporting requirement to labor law violations that bear the most relevance would reduce the burden for contractors and the Government.

Response: The E.O. falls well within the established legal bounds of presidential directives regarding procurement policy. The Procurement Act authorizes the President to craft and implement procurement policies that further the statutory goals of that Act and of the Office of Federal Procurement Policy Act (41 U.S.C. 1101) of promoting "economy" and "efficiency" in Federal procurement. By asking contractors to disclose past labor law decisions the Government is better able to determine if the contractor is likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government. See, *e.g., UAW-Labor Employment & Training Corp.* v. *Chao,* 325 F.3d 360, 366 (D.C. Cir. 2003) (affirming authority of the President under the Procurement Act to require Federal contractors, as a condition of contracting, to post notices informing workers of certain labor law rights). In issuing E.O. 13673, the President explained the broad nexus that exists between general compliance with labor laws and economy and efficiency:

> Labor laws are designed to promote safe, healthy, fair, and effective workplaces. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government. Helping executive departments and agencies to identify and work with contractors with track records of compliance will reduce execution delays and avoid distractions and complications that arise from contracting with contractors with track records of noncompliance.

As explained in the preamble to the proposed FAR rule and the preliminary RIA, a number of studies over the years support the conclusion that there is a relationship between labor law violations and performance problems. These include reports by the GAO, the Senate HELP Committee, HUD's Inspector General, the Fiscal Policy Institute, and the Center for American Progress.

See also the discussion at Section III.B.1. above.

Comment: A respondent commented that the two-step reporting approach does not reduce burdens. In this two-step approach, the first step comprises a "yes/no" representation as to whether a contractor has any covered labor law violations, and the second step requires disclosure of the details of any violation(s).

Response: The two-step process is designed to reduce the preaward burden by only requiring basic labor law decision information to be reported by those for whom a responsibility determination has been initiated, rather than by all prospective contractors that answered affirmatively in the initial representation.

Comment: Respondents were concerned that contractors are required to disclose labor law violations for the past three years and represent accurately, when they had no notice of how past labor law violations might be used in the procurement process and had no reason to track these violations.

Response: The Council recognizes the burden that could be associated with immediate implementation of a three-year reporting period absent appropriate mechanisms to retrieve the information, and therefore is phasing in the reporting periods. In order to best enable compliance with the rule, the Councils have implemented a number of phase-ins for labor law decision disclosure requirements, which are discussed in Section III.B.2.a. above.

Comment: A respondent was concerned that contractor reporting of labor law violation information should be directly tied to a procurement consideration point (contract award, option exercise) rather than set at semiannual intervals. The respondent suggested that information not tied to procurement consideration point serves no useful purpose.

Response: The E.O. contemplated the contracting officer having information throughout the life of the contract, not at a specific procurement consideration point. The final rule, consistent with the proposed rule, requires disclosure of labor law decisions prior to a finding of responsibility for a contract award, and within six months from the last SAM update during performance. The purpose of the recurring update is to enable the contracting officer to determine whether any action is necessary in light of any updates to disclosures or any new decisions disclosed.

Comment: A respondent expressed concern that because the proposed rule required that contractors report on all tiers of their supply chains, the requirement to submit representations of violations with each bid or proposal would require the prime contractor to start very early to accumulate the information needed to make such a representation, or risk that the contractor would be unable to prepare and submit a bid or proposal because it has been unable to obtain information needed for its representation in a timely manner. Further, if and when a contracting officer initiates a responsibility determination and requests mitigating information, the contractor (and its subcontractors) would need time to respond.

Response: The E.O. applies to subcontractors at any tier, with subcontracts valued at greater than $500,000, except COTS acquisitions. Prime contractors are to exercise diligence in selecting responsible subcontractors. In an effort to minimize disruption to the procurement process, DOL will be available to consult with contractors and subcontractors to assist them in fulfilling their obligations under the E.O. DOL will be available to contractors and subcontractors for preassessment consultations on whether any of their labor law violations are potentially problematic, as well as on ways to remedy any problems.

As a matter of clarification, representations are made to the best of the offeror's knowledge and belief at the time of an offer. Prime and subcontractor representations are separate and distinct. Prime contractors represent their own labor law decisions rendered against them (see FAR 52.222–57 and 52.222–59(c)(3)). Subcontractor representations of whether they have had or have not had labor law decisions rendered against them are separately made under the FAR 52.222–58 provision to prime contractors and the Councils have clarified this language at FAR 52.222–58, paragraph (b). If the prospective subcontractor responded affirmatively in its representation, and a responsibility determination has been initiated by the prime contractor, the prospective subcontractor will be directed by the prime contractor to disclose its labor law violation information to DOL.

Likewise, prime contractors provide subcontractors an opportunity to provide remediating and mitigating information to DOL that the subcontractor deems necessary to demonstrate its responsibility.

Comment: Respondents expressed concern that risks of an adverse responsibility determination are borne by the prime contractor, who will be forced to pursue, compile, and update information throughout its supply chain in order to effectively manage risk associated with ongoing labor compliance reporting.

Response: As stated in FAR 9.104–4(a), prime contractors are responsible for determining the responsibility of their prospective subcontractors. This final rule does not change the responsibility paradigm. In the final rule, the Councils adopted the alternative approach to disclosure whereby prospective subcontractors submit labor law violation information directly to DOL rather than the prime contractor. This alternative approach reduces burden on the prime contractor; it also provides access to DOL's expertise which may reduce overall risk.

Comment: Respondents expressed concern that the proposed reporting is unnecessarily duplicative and disrupts well-established, legally protected enforcement mechanisms and highly effective settlement processes. As an example, one respondent stated that OSHA maintains databases of inspections and citations that contain inspection case detail for approximately 100,000 OSHA inspections conducted annually. Additionally, accident investigation information is provided, including textual descriptions of the accident, and details regarding the injuries that may have occurred. Respondents suggested that DOL should report on and aggregate existing enforcement data, rather than imposing this requirement on contractors. Alternatively, DOL should fund its own data collection effort and allow industry to input data into that DOL portal.

Response: This rule does not intend to disrupt existing settlement processes in place by DOL or other enforcement agencies. Whenever possible, the Government seeks to use and leverage existing databases, sources, and systems. As explained in Section III.B.2.c., the existing systems of DOL and other enforcement agencies do not satisfy the current needs of the Government in meeting the objectives of the E.O. DOL and other enforcement agencies are actively working to upgrade these systems for use by the Government in compiling and maintaining administrative merits determination enforcement data and contractor-disclosed data for purposes of implementation of the E.O. Enforcement agency databases do not and will not collect labor law violation data on civil judgments, arbitral awards or decisions. Thus, disclosure of labor law violations contemplated under the E.O. will necessarily include some level of disclosure by contractors. Therefore, contractors and subcontractors are best positioned to provide labor law violation information.

Comment: Respondents stated that the proposed rule shifts a significant proportion of the burden of monitoring and enforcing labor, workplace safety, and anti-discrimination compliance across multiple jurisdictions from the Government agencies responsible for ensuring such compliance, namely the DOL and State labor departments, to contracting agencies and contractors.

Response: Neither the E.O. nor the FAR implementation shifts enforcement responsibility away from enforcement agencies. The rule emphasizes the consideration of labor law violation information as part of the contracting officer's and prime contractor's responsibility determination process.

d. Risk of Improper Exclusion

Comment: Respondents, including the SBA Office of Advocacy, surmised that the proposed regulation will have adverse impacts particularly on small subcontractors; many prime contractors will simply avoid contracting with a company that has a violation, rather than wait for the outcome of a responsibility determination. A respondent raised a concern that a contracting officer faced with choosing between an offeror with a "clean record," or an offeror with some alleged labor law violations, would likely find it easier to select the offeror that does not require a labor law assessment.

Response: The objective of the E.O. is for prime contractors to contract with responsible parties, not to disregard subcontractors with labor law violations. To further this objective, the E.O. seeks to help contractors—especially those with serious, repeated, willful, and/or pervasive violations—come into compliance with labor laws, not to deny contracts. Companies with labor law violations will be offered the opportunity to receive early guidance on whether those violations are potentially problematic and how to remedy any problems. Very minor labor law violations do not meet the threshold of serious, willful, and/or pervasive, and in most cases a single violation of law may not necessarily give rise to a determination of nonresponsibility, depending on the nature of the violation (see E.O. Section 4(i) and DOL Guidance).

The final rule has been revised at FAR 22.2004–2(b)(6) to clarify that "disclosure of labor law decisions does not automatically render the prospective contractor nonresponsible" and "the contracting officer shall consider the offeror for contract award notwithstanding disclosure of one or more labor law decision(s)." (Similar language is added at FAR 52.222–59(c)(2) regarding subcontractor decisions.) Contracting officers consider the totality of circumstances in a particular procurement when making responsibility determinations and contract award decisions. In doing so, contracting officers have an obligation to possess or obtain sufficient information to be satisfied that a prospective contractor has met specific standards of responsibility. Documents and reports supporting a determination of responsibility or nonresponsibility must be included in the contract file (see FAR 9.105–2(b)). As explained in Section VI of DOL's Guidance, prospective contractors are encouraged to contact DOL for a preassessment of labor law violation information.

Comment: Respondents raised a variety of concerns regarding a potential *de facto* debarment. A respondent stated that the rule would increase contractors' incentive to bring protests, as a nonresponsibility determination would in essence be a *de facto* debarment. Another concern was contracting officers using one another's nonresponsibility determinations without conducting an independent assessment. A related concern was that the due process protections of FAR subpart 9.4 would be unavailable. A respondent suggested that guidance is necessary regarding types of conduct leading to denial of contracts.

Response: The rule does not supplant or modify suspension and debarment processes, which, consistent with current regulations, are considered in certain extreme cases when previous attempts to secure adequate contractor remediation have been unsuccessful, or otherwise to protect the Government from harm. Evidence of a prospective contractor's past violations of labor laws is a basis to inquire into that contractor's potential for satisfactory labor law compliance; furthermore, how the prospective contractor has handled past violations is appropriately considered as being indicative of how it will handle future violations. Under longstanding tenets reflected in FAR subpart 9.1, contracting officers have the discretion to consider violations of law, whether related to Federal contracts or not, for insights into how a contractor is likely to perform during a future Government contract. These long-standing tenets also hold that determinations regarding a prospective contractor's responsibility shall be made by the particular contracting officer responsible for the procurement. Requiring that decisions be made on a case-by-case basis helps to ensure that actions are taken in proper context. While this approach may result in different decisions by different contracting officers, steps have been taken in the context of this rulemaking that will help to promote consistency in assessments of labor law violation information by ALCAs and the resultant advisory input to the contracting officers and will result in greater certainty for contractors. In particular, ALCAs will coordinate with DOL and share their independent analyses for consideration by other ALCAs. This collaboration should help to avoid inconsistent advice being provided to the contractor from different agencies.

Comment: Respondents identified the due process procedures in the FAR regarding suspension and debarment and noted that suspension and debarment is a business decision and not for enforcement or punishment.

Response: The Councils agree. Suspension and debarment is a discretionary action, for a finite period of time, to protect the Government's interest, which is available for specific causes and is invoked in accordance with procedures in FAR subpart 9.4. The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment (FAR 9.402(b)).

Comment: A respondent commented that, if Congress had intended for Federal contracting remedies, such as suspension and debarment, to apply to violations of all 14 laws cited in E.O. 13673, Congress would have specifically identified this; instead, only two of the statutes in the E.O.—the Davis-Bacon Act and the Service Contract Act—identify that the suspension and debarment remedy should be available for violations.

Response: Neither the FAR Council's rule nor DOL's Guidance expand or change the availability of suspension or debarment as a statutory remedy under the FAR or under the labor laws cited in the E.O. Under existing FAR subpart 9.4, agencies are given the administrative discretion to exercise suspension and debarment to protect the Government from harm in doing business with contractors that are not responsible sources. The rule requires only that contractors and subcontractors disclose certain labor law decisions (and mitigating factors and remedial measures) so that this information can be taken into account as part of responsibility determinations and for award decisions. The rule has been constructed to help contractors come into compliance with labor laws, and consideration of suspension and debarment is only considered when previous attempts to secure adequate contractor remediation have been unsuccessful and to protect the Government's interest. The rule provides for a number of mechanisms to help contractors come into compliance, including labor compliance agreements, that derive from labor enforcement agencies' inherent authority to implement labor laws and to work with covered parties to meet their obligations under these laws. (See also Section III.B.1. above.)

e. Request for Clarification on Scope of the Reporting Entity

Comment: Respondents, including the SBA Office of Advocacy, were unclear whether the representation of labor law violation history is required for the legal entity signing the offer alone, or if they must also represent for related entities, such as parents, subsidiaries, and affiliates. Respondents further questioned whether the subcontractor representation requirement would encompass supplier agreements or arrangements.

Some respondents recommended expanding what is reported under the representation to include the parent, subsidiaries, and affiliates of the contractor. Respondents considered this especially important where an entity exists less than three years and noted that some contractors might use subsidiaries and affiliates to evade reporting requirements. One respondent further recommended the reporting entity be expanded to also encompass partnerships and joint ventures. Alternatively, a respondent indicated that a contractor should be at least required to identify its affiliates (parent corporations, subsidiaries) in its disclosures.

Other respondents stated that reporting should be limited to the entity performing the contract and recommended against expanding the representation and certification requirement. One respondent was concerned such an expanded requirement would serve to discourage participation and have a negative impact on the number of contractors participating in Federal procurement. Another respondent expressed concern that such an expansion might lead to an unmanageable volume of disclosures. Others, including the SBA Office of Advocacy, were concerned with the associated increase in costs and impact on mid or small-sized businesses.

Response: The scope of prime contractor and subcontractor representations and disclosures follows general principles and practices of the FAR that are the same for other provisions requiring representations and disclosures. The requirement to represent and disclose applies to the legal entity whose name and address is entered on the bid/offer and that will be legally responsible for performance of the contract. The Councils decline to expand the scope of the representation and disclosure requirement beyond that required in the E.O. and existing FAR practices. See the more detailed discussion of "legal entity" in Section III.A.3.a. above.

As is the current FAR practice, FAR rules are applied (unless specifically instructed otherwise) to solicitations from the effective date of the rule and are not applied retroactively to pre-existing contracts or subcontracts.

The representation and disclosure requirements of this FAR rule apply prospectively to subcontracts containing the provision at FAR 52.222–58, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673), and the clause 52.222–59 Compliance with Labor Laws (Executive Order 13673). Regarding applicability to supplier agreements or arrangements, neither the E.O. nor the FAR rule contains an exception for supplier arrangements or agreements. However, the exemption for COTS items, and the $500,000 and above threshold, should minimize the number of supplier agreements with small businesses that are covered by the E.O.

Comment: Respondents asked for clarification on representation and disclosure requirements for companies in a joint venture or other teaming arrangement, and stated that it is unclear how companies acting jointly as a prime contractor should assess each other or how each would be assessed—separately or jointly. One respondent recommended the reporting entity encompass partnerships and joint ventures.

Response: The final rule has been revised to include a clarification in the provision at FAR 52.222–57 that if the offeror is a joint venture that is not itself a separate legal entity, each concern participating in the joint venture must separately comply with the representation and disclosure requirements. A joint venture that is a separate legal entity will be treated as a separate legal entity. A teaming arrangement that is a prime contractor with subcontractor will represent and disclose separately as a prime contractor and as a subcontractor. Labor law decisions that are represented and disclosed will be considered for the concern that made the disclosure.

4. Labor Law Decision Disclosures as Relates to Prime Contractors

Introductory Summary: The FAR Council received considerable comments addressing disclosure of labor law decisions. There was general support of a process by which contractors and subcontractors may consult with DOL and other enforcement agencies to receive early guidance on whether labor law violations are potentially problematic, and to receive assistance and an opportunity to remedy problems prior to a particular procurement. Some respondents said that public access to contractor disclosures will foster increased compliance with labor laws, while other respondents expressed concern about public access and safeguarding of information disclosed by contractors. The FAR Council received comments on the type of documents and information that should be disclosed by contractors; comments for and against reporting by third parties of labor law violations; and comments with respect to contractor reliance on representations, information, and documents submitted by subcontractors.

a. General Comments

Comment: Respondents requested that the rule clarify that contractors, prior to particular procurements, have access to a "preclearance" process for consulting with DOL concerning their labor law violation history, and that contracting officers could accept DOL's recommendations in making a responsibility determination.

Response: The availability of DOL for consultation, prior to a contractor responding to a solicitation, is not addressed in the FAR text, which generally focuses on requirements invoked by clauses and provisions in solicitations. However, DOL's Guidance (Section VI Preassessment) includes information about the process by which contractors and subcontractors can consult with DOL and other enforcement agencies for assistance. Specifically, contractors and subcontractors are encouraged to receive early guidance on whether violations are potentially problematic, as well as avail themselves of the opportunity to remedy any problems. DOL's assessment, even if made prior to a particular procurement, is available to contracting officers through ALCAs for consideration during responsibility determination.

b. Public Display of Disclosed Information

Comment: Several respondents provided inputs on the benefits and drawbacks of public display of disclosed information. Some respondents recommended that the Government should make the disclosed information publicly available. One respondent indicated that public availability would foster increased compliance with labor laws, as well as increase third-party awareness. On the other hand, some respondents contended that public disclosure of information provided at the prime or subcontractor level could harm the contractor's business and reputation, lead to more protests, and inadvertently expose confidential, sensitive, and classified information. Respondents stated that if information must be made publicly available, it should be limited to final determinations.

Response: At the prime contract level, the final rule requires the public disclosure of prospective contractors' representation whether they have labor law decisions concerning violations of covered labor laws rendered against them within the last three years (phased-in, see Section III.B. 2.a. above) and, for prospective contractors being assessed for responsibility, certain basic information about the violation (*i.e.*, the law violated, docket number, date, name of the body that made the determination or decision). Disclosure of the representation and of the basic information about the labor law decisions will be made publicly available in FAPIIS. The rule does not provide for public disclosure of remedial and mitigating information the prospective contractor deems necessary to demonstrate its responsibility, unless the contractor determines that it wants the information to be made public. See FAR 22.2004–2(b)(1)(ii) and 52.222–57(d)(1)(iii). Concerning the decisions themselves, the rule limits publicly disclosed information to specified data elements in order for the Government to obtain copies of the decision documents; the rule does not require disclosure to the public of the decision documents themselves. These decision documents will be available for ALCAs and will not reside in SAM or FAPIIS.

Comment: Respondents believed that the Government should provide for protections to safeguard personal, corporate, and confidential information; information relating to classified contracts or subcontracts; personally identifiable and business proprietary information; and information disclosed by contractors during the bidding process and during the life of the contract. One respondent in particular recommended that the FAR Council draft guidelines for internal handling of contractor-provided information and provide appropriate protections from disclosure under FOIA.

Response: Executive agencies each have procedures in place for the handling and safeguarding of sensitive but unclassified information; additional procedures are not necessary.

All public requests for information will be handled under FAR part 24, Protection of Privacy and Freedom of Information, as usual. The data elements at FAR 52.222–57 (d)(1)(iii) (*e.g.*, mitigating factors) will be included in SAM and available to contracting officers and the registrant, but will not be publicly disclosed in FAPIIS unless the Contractor determines that it wants this information to be public. The rule does not alter the current FAR procedures for classified contracts (see FAR subpart 4.4).

Comment: Respondents believed that the Government should provide a means for the contractor that provided the information to redact confidential business information before it appears on SAM or FAPIIS.

Response: The rule does not provide for confidential business information to be included on SAM or FAPIIS. The basic information disclosed about the decision (*e.g.*, the labor law violated, the case number) is not confidential business information and will appear in FAPIIS. The contractor may redact any mitigating information provided at the discretion of the contractor into the SAM database or directly to the contracting officer. The contracting officer may inquire if the contracting officer needs to know the redacted information.

Comment: One respondent requested that the prime contractor be made to safeguard the subcontractor's information in the same manner as the Government is responsible for handling the prime contractor's information.

Response: The laws that govern the protection of information shared by the prime contractor with the Government (*e.g.*, FOIA) do not apply to protection of information shared between contractors, such as a subcontractor sharing its information with the prime contractor. However, as a matter of good business practice, many private parties negotiate protections. This is a matter between the parties.

Comment: Respondents discussed concerns that as a result of the rule, FOIA-related legal proceedings would increase, which would delay the procurement process and significantly adversely impact the efficiency of Government contracting. Reasons cited for the respondents' concerns included: Increased exposure of contractor-proprietary or competition-sensitive data, increased FOIA requests, and "reverse FOIA appeals" whereby contractors seek to protect contractor-proprietary or competition-sensitive information. The respondents cautioned that responding to FOIA requests will require considerable Government administrative time and personnel to retrieve relevant information, review and issue decisions, and litigate appeals at the agency level or in Federal court.

Response: The rule requires limited information about labor law decisions to be disclosed to the Government by contractors; however, the general rules for Government disclosure to the public are not changed as a result of the rule. The Councils acknowledge that handling FOIA requests can absorb Government time. However, FOIA requests are handled independently of procurements and do not typically delay procurements.

c. Violation Documents

Comment: Respondents stated that the proposed rule should require that more than just "basic information" about violations be made publicly available in the FAPIIS database. Respondents advocated for the public availability of the actual labor law violation documents, contractor-provided mitigation or remedial information (including settlement agreements and labor compliance agreements), the ALCA's analysis, and the contracting officer's resultant determination.

Response: The rule requires offerors to provide basic information on labor law decisions (such as the law violated, case number, date rendered, and name of the body that made the determination or decision). Disclosure of this basic information about the labor law decisions will be made publicly available in FAPIIS. If a labor compliance agreement is entered into by a contractor, this information will be entered by the Government into FAPIIS.

Comment: Respondents identified pros and cons of allowing labor law violation reporting by third parties, such as employees, their representatives, fair contracting compliance organizations, labor-management cooperation committees, community groups, labor organizations, worker centers, and other worker rights organizations.

Some respondents advocated for allowing reporting of relevant information by third parties if they have information that contractors may not have properly disclosed relevant information. A respondent asserted that worker rights organizations may have experience with employers' compliance records. This information might include grievances, compliance with monitoring arrangements, or compliance with a labor compliance agreement. Some respondents advocated for third-party access to Government information on contractor responsibility. Another proposed that ALCAs and contracting officers should affirmatively reach out to worker organizations.

On the other hand, some respondents were concerned about the negative implications of third-party reporting. A chief concern was that a labor union seeking to organize the contractor might have an incentive to report meritless labor law allegations in order to exert pressure on contractors. Another concern was that the third parties may report "violations" that are being resolved, are not yet fully adjudicated, or lack merit altogether.

Response: Paragraph (b) of Section 2 of the E.O. provides that information may be obtained from other sources during performance of a contract. Specifically, E.O. Section 2(b)(ii) and (iii) provide that, during contract performance, contracting officers, in consultation with ALCAs, shall consider information obtained from contractor disclosures or relevant information from other sources related to required labor law violation disclosures.

The Councils have revised the rule at FAR 22.2004–3, Postaward assessment of a prime contractor's labor law violations, at paragraph (b)(1), to address ALCA consideration of relevant information from other sources. The Councils have not expanded access to nonpublic Government information nor created a requirement for affirmative outreach to obtain information.

With regard to respondents' concerns about meritless allegations from third parties, ALCAs will not recommend any action regarding alleged violations unless a labor law decision, as defined in FAR 22.2002, has been rendered against the contractor.

Comment: In order for the ALCA to have sufficient time to consult with third-party groups, a respondent recommended that the ALCA be given more time to conduct his or her assessment of labor law violations.

Response: The ALCA assesses violation information that is related to labor law decisions, including information that originates with third-party groups, in assessing a contractor's record of labor law compliance. The three business day timeframe in the final rule at FAR 22.2004–2(b)(2) pertains to preaward review of labor law violation information and was established to minimize negative impacts to procurement timelines. FAR 22.2004–2(b)(2) also provides that a contracting officer can determine another time period. The ALCA does not consult with third-party groups about labor compliance records related to specific ongoing procurements, due to Procurement Integrity Act restrictions (see 41 U.S.C. chapter 21). The E.O. also provides for information from other sources during contract performance. The FAR implementation of this postaward requirement does not prescribe the time available for the ALCA's postaward review. Also, in conducting subsequent assessments, the ALCA will consider such information.

d. Use of DOL Database

Comment: A respondent stated that DOL should use its existing databases and systems to capture labor law compliance information, in order to protect contractor business information and minimize the duplicative cost and process of collecting data from numerous contractors.

Response: The Councils agree on the importance of leveraging existing databases and systems where possible. Enforcement agency databases do not and will not collect labor law violation data on civil judgments, or on arbitral awards or decisions. Thus, disclosure of labor law decisions contemplated under the E.O. will necessarily include some level of disclosure by contractors. At this time, existing data systems do not include all of the information required by the E.O. DOL is working to ensure that its databases provide the information necessary to implement the E.O. regarding administrative merits determinations.

e. Remedial and Mitigating Information

Comment: Respondents stated that the Government should provide a safe harbor framework. One respondent recommended that contractors and higher-tiered subcontractors can safely rely on representations, information, and documents provided by prospective and actual subcontractors, without the need to independently verify information. Another respondent recommended that civil liability protection for contractors be provided if a subcontractor litigates the responsibility decision.

Response: The rule provides a safe harbor with respect to reliance on the FAR 52.222–58 and 52.222–59(c)(3) representations. The representation is provided to the best of the subcontractor's knowledge and belief at the time of submission. In support of the subcontractor responsibility decision and consideration of updates during contract performance, information and documents may be provided to the contractor. The contractor may rely on those representations, information, and documents. The contractor is responsible for reviewing the information and documents in making reasoned decisions. The final rule has been revised to state that "A contractor or subcontractor, acting in good faith, is not liable for misrepresentations made by its subcontractors about labor law decisions or about labor compliance agreements". FAR 52.222–58(b)(2) and 52.222–59(f).

With respect to indemnification from civil liability, consistent with current procurement practices the rule does not provide such protections.

Comment: One respondent recommended that the public Web site where contractors are required to submit basic information about labor law violations should be updated to reflect subsequent decisions in the contractor's favor.

Response: At the FAR 52.222–59 clause, the contractor is required to update basic information semiannually in SAM. The rule does not restrict contractors from providing updated information more frequently, whether the update is favorable or unfavorable.

Comment: Respondents approved of the DOL-stated intention to allow contractors and subcontractors the opportunity to seek the DOL's guidance on whether any of their violations of labor laws are potentially problematic, as well as the opportunity to remedy any problems, and urged DOL to formalize this as a "preclearance" process. They suggested that such a process for subcontractors would greatly benefit the prime contractors by creating a "safe harbor," guaranteeing that any "precleared" subcontractors they hire would have no outstanding unremedied labor law violations. One respondent encouraged DOL to issue a proposed process for notice and comment on how this process will work, and how contractors may access it.

Response: The FAR rule only addresses implementation at the initiation of the procurement process. However, the DOL Guidance (at Section VI Preassessment) encourages early consultation with DOL, prior to being considered for a contract or subcontract opportunity, to address appropriate remediation and obtain DOL guidance and assessments.

Comment: Respondents recommended that the regulations clarify that the prime contractor's representation regarding compliance with labor laws is required after it wins a contract competitively, not in its initial offer.

Response: Representations are required when offerors submit either a bid or proposal in response to a solicitation. This practice allows the contracting officer to consider labor law violation information when determining contractor responsibility, which is done before award. No clarification to the FAR text is required.

Comment: A respondent recommended that prime contractors that disregarded DOL advice should be responsible for the subcontractor violation as if the prime contractor had committed the violation.

Response: The rule does not change remedies for false information submitted to the Government. The rule is not intended to remove the prime contractor's discretion in reviewing responsibility of their subcontractors, nor to provide a penalty for exercising business discretion. Prime contractors continue to be responsible for awarding contracts to subcontractors with a record of satisfactory integrity and business ethics; they are also responsible for the performance of their subcontractors once award is made.

5. Labor Law Decision Disclosures as Relates to Subcontractors

Introductory Summary: To minimize burden on, and overall risk to, prime contractors and to create a manageable and executable process for both prime contractors and subcontractors, the proposed rule offered alternative language for subcontractor disclosures and contractor assessments of labor law violation information. After considering public comments, the final rule adopts this alternative approach. In the final rule, at FAR 22.2004–1(b), 22.2004–4, and 52.222–59(c) and (d), subcontractors disclose details regarding labor law decisions rendered against them (including mitigating factors and remedial measures) directly to DOL for review and assessment instead of to the prime contractor. The next set of comments focuses on the alternative approach for subcontractor disclosures and contractor assessments.

a. General Comments

Comment: Respondents commented that subcontractor disclosures and prime contractor assessments of those disclosures would impose costly, burdensome, and difficult requirements for prime contractors to manage. Respondents further expressed concern that contractors do not have sufficient expertise, staff, and time to assess and track subcontractor labor law violation disclosures and responsibility determinations for subcontractors and their supply chain. Respondents recommended that DOL be tasked with evaluating subcontractors' history of violations and assessing the need for a labor compliance agreement.

Respondents expressed concern that multiple prime contractors may provide inconsistent assessments of a single subcontractor. Another expressed concern that the proposed rule did not provide guidance on the roles and responsibilities of the ALCA, DOL, and the contracting officer regarding a subcontractor's responsibility determination during the preaward assessment process.

A respondent expressed concern that contractors may demand additional remediation measures from subcontractors in order to ensure they are found responsible by the contracting agency.

Response: As stated in the summary, the Councils have adopted the alternative approach. The final rule has been revised at FAR 52.222–59(c) and (d) to incorporate this alternative whereby subcontractors provide their labor law decision information to DOL.

DOL's review and assessment of subcontractor labor law decision information (and mitigating factors and remedial measures) will promote consistent assessments as to whether labor law violations are of a serious, repeated, willful, and/or pervasive nature, and whether labor compliance agreements are warranted. It will also limit the likelihood that different contractors would provide inconsistent assessments on a single contractor. The alternative process will also minimize the effort required by prime contractors to obtain additional resources and expertise to assess and track subcontractor labor law decision disclosures. ALCAs are not involved in the assessment of subcontractor labor law violation information. Prime contractors will continue to make subcontractor responsibility determinations in accordance with FAR 9.104–4(a). In making such responsibility determinations, prime contractors will consider labor law compliance as an indicator of integrity and business ethics. Subcontractors will also be afforded an opportunity to provide information to DOL on mitigating factors and remedial measures, such as subcontractor actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws.

Comment: A respondent raised concerns that DOL is not required to provide its assessment of labor law violation information within any particular time frame. The respondent postulated that, as a result, the process implemented in the alternative (FAR 52.222–59(c) and (d)) for subcontractors to disclose directly to DOL may result in weekly or monthly delays awaiting DOL's assessment. The respondent indicated that this is not consistent with the time frames for most procurements and would be disruptive to contractors' ability to depend on subcontractor availability and to rationally plan their proposals or bids. On the other hand, the respondent cautioned that permitting prime contractors to make a separate responsibility determination if DOL has failed to respond to the subcontractor's submission within three days leaves the prime contractor at substantial risk if DOL eventually provides an adverse assessment. The respondent concluded that the alternative process would be likely to place undue pressure on subcontractors to come to terms with DOL on labor compliance agreements that, if negotiated without the immediacy of a pending procurement, would likely come out very differently.

Response: As stated in the summary, the Councils have adopted the alternative approach whereby subcontractors provide their labor law violation information to DOL. The final rule has been revised at FAR 52.222–59 (c) and (d) to incorporate this alternative. Paragraph (c)(6) of the clause indicates that the contractor may proceed with making a responsibility determination using available information and business judgment, for appropriate circumstances, when DOL does not provide advice to the subcontractor within three business days.

To maintain the time frames for most procurements, prospective subcontractors with labor law violations are encouraged to consult early with DOL, prior to being considered for a subcontract opportunity, to: Address appropriate remediation, obtain DOL Guidance and assessment, mitigate the risk of DOL providing an adverse assessment and reduce delays and disruption of potential subcontract awards (see DOL Guidance Section VI, Preassessment).

Comment: A respondent recommended the Councils give contractors a choice about whether to use the language in the proposed rule, or the alternative approach, for paragraphs (c), Subcontractor responsibility, and (d), Subcontractor updates, of FAR 52.222–59 in their contracts with subcontractors.

Response: In consideration of public comments, the Councils have revised the final rule at FAR 52.222–59(c) and (d) to incorporate the alternative presented in the proposed rule, whereby subcontractors provide their labor law decision disclosures to DOL. This approach is mandatory for contractors. By implementing the procedures in the alternative language, the final rule will minimize contractor costs and procedural steps required for compliance. Implementing two processes as suggested by the respondent, and allowing contractors to choose which process to utilize, would be administratively unmanageable for subcontractors and the Government; therefore, the Councils decline to accept the suggestion.

b. Definition of Covered Subcontractors

Comment: A respondent expressed concern that it was too costly and burdensome to enforce the requirements of the proposed rule, which apply to all subcontractors at any tier with subcontracts estimated to exceed $500,000, except for contracts for COTS items. The respondent recommended the final rule cover only first tier subcontractors. However, another respondent recommended that subcontractors at all tiers, regardless of dollar value, be subject to the proposed rule.

Response: Section 2(a)(iv) of the E.O. applies this requirement to any subcontract where the estimated value of supplies and services required exceeds $500,000 except for contracts for COTS items. Limiting applicability to first tier subcontractors or removing the dollar threshold alters the E.O. requirements. The final rule, similar to the proposed rule, implements the E.O. requirements.

Comment: A respondent expressed concern that the proposed rule would incentivize contractors to refuse to subcontract with companies with very minor violations, which would disrupt longstanding business relationships and even drive small and middle-tier subcontractors out of business.

Response: The E.O. and rule seek to help contractors come into compliance with labor laws, not to deny contracts or subcontracts. Companies with labor law violations are encouraged to consult early with DOL on whether those violations are potentially problematic and how to remedy any problems. Very minor labor law violations do not meet the threshold of serious, repeated, willful, and/or pervasive (see DOL Guidance). The final rule has been revised at FAR 52.222–59(c)(2) to state that "Disclosure of labor law decision(s) does not automatically render the prospective subcontractor offeror nonresponsible. The Contractor shall consider the prospective subcontractor for award notwithstanding disclosure of one or more labor law decision(s)."

Comment: Respondents asserted that the rule would encourage contractors to seek to avoid Buy American restrictions and purchase from foreign subcontractors who have no employees performing work within the United States, and therefore have no United States labor law violations. One respondent stated that the efforts to block noncompliant U.S. companies from participating in the Federal contractor process should not be allowed to provide an incentive for the use of non-U.S. workers, thus violating the goals of the Buy American requirements.

Response: The Councils acknowledge the concern. However, the statues and the E.O. are clear. As stated in Sec. 9(b) of the E.O., the requirement of this E.O. shall be implemented consistent with applicable law. As such, the implementing FAR rule does not affect the applicability of existing Buy American Act and trade agreement requirements with regards to foreign acquisitions and subcontractors, and does not alleviate contractors' compliance with these laws. For contracts performed outside the United States, a company that had no employees in the United States would have employees subject to the laws of another country, and that country would enforce its own labor laws on the company, not United States laws. Labor law violations that rise to the level of Trafficking in Persons would be covered by FAR subpart 22.17.

Comment: A respondent commented that the proposed inclusion of subcontractor disclosure will require public disclosure of proprietary information (the identity of subcontractors the contractor would be using to perform the contract) which is protected from disclosure by FOIA. On the other hand, another respondent commented that DOL's assessment of the subcontractor should be transparent, rigorous, and public.

Response: As stated in the summary, the Councils have adopted the alternative approach. The final rule has been revised at FAR 52.222–59(c) and (d) to incorporate the alternative whereby subcontractors provide their labor law violation information to DOL. The subcontractor's semiannual updates of this information will also be provided to DOL and DOL will assess this information in accordance with the DOL Guidance. The E.O. and rule do not compel public disclosure of subcontractors' identity, labor law violation information, nor DOL's assessment of that information.

Comment: A respondent expressed concern that the proposed DOL Guidance defined a "covered subcontract" as "any contract awarded to a subcontractor that would be a covered procurement contract except for contracts for commercially available off-the-shelf items." The respondent stated this definition is overly broad and is inconsistent with the definition of subcontract in FAR part 44, Subcontracting Policies and Procedures, which does not exclude COTS items.

Response: The DOL Guidance is not inconsistent with the definitions of "subcontract" and "subcontractor" in FAR part 44. Unlike FAR part 44, the DOL Guidance does not specifically define these terms. Rather, it defines the term "covered subcontract"—meaning a subcontract that is covered by the E.O. It describes how it uses the term "subcontractor," for ease of reference both to subcontractors to subcontractors and prospective subcontractors. Neither of these uses of the terms are inconsistent with FAR part 44. The definition of "covered subcontract" in DOL Guidance is consistent with Sec.

2(a)(iv) of the E.O. which limits applicability to prime contracts and any subcontracts exceeding $500,000, except for acquisitions for COTS items. Prime contractors will determine applicability by following the requirement as it is outlined in FAR 52.222–59(c)(1).

Comment: A respondent recommended requiring contractors to consult with, and obtain a recommendation from, DOL regarding the review and assessment of subcontractor disclosed information, rather than letting the prime decide whether to consult DOL.

Response: As stated in the summary, the Councils adopted the alternative approach presented in the proposed rule and have revised the final rule at FAR 52.222–59(c) whereby subcontractors provide their labor law decision disclosures to DOL. DOL will review and assess the labor law violations and advise the subcontractor who will make a representation and statement to the prime contractor pursuant to FAR 52.222–59(c)(4). In the implemented alternative, the prime does not elect whether the subcontractor discloses to the prime or DOL; instead, the subcontractor discloses to DOL.

Comment: A respondent recommended ensuring the process for evaluating labor law violation information of subcontractors be as transparent and rigorous as it is for primes' labor law violation information. The respondent recommended requiring DOL to publicize that it is conducting a review of labor law violation information; requiring subcontractor disclosed information to be publicly accessible to the same extent as prime disclosed information; requiring subcontractors to provide the same information that primes must provide on labor law violations; providing for 10 business days for DOL to perform an assessment; and requiring the prime contractor to disclose to the contracting officer all of the documentation underlying its responsibility determination of the subcontractor.

Response: The E.O. and the rule compels public disclosure of basic labor law decision information of the contractor (*e.g.*, the law violated, case number, date, name of the body that made the decision), but not the subcontractor. In implementing the E.O., the Councils seek to balance the importance of transparency with efficiency, recognizing the potentially sensitive nature of relevant labor law violation information, and do not agree with expanding on the E.O.'s disclosure requirements. Therefore, no revision to the rule is made.

c. Authority for Final Determination of Subcontractor Responsibility

Comment: Respondents made comments on who should have the authority to make final determinations of subcontractor responsibility. Some respondents recommended the Councils amend the final rule to make contracting officers responsible for evaluating subcontractor responsibility in regard to labor law violations. One respondent recommended that contractors alone should make the final determination regarding subcontractor responsibility. Another respondent recommended the Councils amend the final rule to prohibit DOL from giving advice on subcontractor responsibility because DOL does not have the same amount of experience and expertise as contracting officers.

Response: The final rule, consistent with the proposed rule, builds on prime contractors' existing obligation to determine the responsibility of their subcontractors and does not change who has the authority to determine subcontractor responsibility in accordance with FAR 9.104–4(a). DOL will be responsible for analyzing subcontractor labor law violation information and providing an assessment which subcontractors can provide to primes for use in determining subcontractor responsibility, but DOL does not conduct a responsibility determination.

d. Governmental Planning

Comment: A respondent expressed concerns regarding prime contractor liability to an actual or prospective subcontractor, for either denying a subcontract award or discontinuing a subcontract because the prime found the actual or prospective subcontractor nonresponsible based on the subcontractor's labor law violations.

Response: Contractors will continue to make subcontractor responsibility determinations in accordance with FAR 9.104–4(a). The final rule does not change the legal consequences of a prime contractor's nonresponsibility determination of its actual or prospective subcontractors. Likewise, the rule does not alter the discretion a contractor has in making appropriate decisions regarding whether to discontinue a subcontract.

Comment: A respondent commented that giving primes a six-month cycle for review of thousands of subcontractors is not executable on a timely basis, even if only a small number of subcontractors report decisions concerning violations of the E.O.'s covered labor laws.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. This change shifts subcontractor disclosure assessment from the prime contractor to DOL (see FAR 52.222–59(c) on the procedures). The prime contractor's responsibility is to consider DOL's analysis and determine whether to take action with their subcontractor.

Comment: A respondent stated the proposed rule lacks procedures for subcontractors to challenge prime contractors' responsibility determinations.

Response: Neither the current FAR nor the rule includes procedures for subcontractors to challenge prime contractors' responsibility determinations (see FAR 9.104–4(a)). The prime contractor's responsibility determination of their prospective subcontractors, including review of labor law compliance history, remains a matter between the two parties.

Comment: Respondents remarked that the proposed rule creates the possibility of conflicting determinations between DOL and the ALCA, as well as between the contracting officers and various prime contractors, regarding subcontractors' labor law compliance history.

Response: The DOL Guidance includes a consistent approach for ALCAs and DOL to use when considering labor law violation information. However, each responsibility determination, made by a contracting officer or prime contractor, is independent and fact-specific, and therefore responsibility determinations may differ.

e. Subcontractor Disclosures (Possession and Retention of Subcontractor Information)

Comment: Several respondents raised concerns about prime contractors possessing and retaining subcontractor information. The SBA Office of Advocacy asked how prime contractors would be required to handle subcontractors' proprietary information. Other respondents recommended greater protection for subcontractor's confidential and proprietary information, including restrictions on handling and distribution. Some respondents cited increased risks of third-party liability, breach of contract, bid protests, and other litigation. One respondent commented that supplying information to the primes would violate legal privileges.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. This approach seeks to minimize the need for prime contractors to retain subcontractor labor law violation information. Notwithstanding, the rule does not address current practices for primes and subcontractors regarding the handling and distribution of subcontractor information including proprietary or confidential information that subcontractors might provide in support of a subcontractor responsibility determination. Subcontractors may assert to their primes what information they consider proprietary or confidential, by marking it for restrictions on disclosure and use of data.

Comment: Respondents commented that the rule inappropriately attempts to shift responsibility for labor law enforcement to prime contractors.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. Subcontractors provide their labor law violation information to DOL, not to prime contractors. Prime contractors will review the subcontractor representation and DOL's analysis provided by the subcontractor in order to assess integrity and business ethics and make a responsibility determination. The rule does not impinge on or shift responsibility for enforcement of labor laws to prime contractors. Only the enforcement agencies have statutory or other (*e.g.,* E.O.) prescribed jurisdictional authority to administer and enforce labor laws. The rule simply provides prime contractors with relevant information to consider in making appropriate determinations and subcontract decisions.

Comment: One respondent remarked that large projects would require a prime to certify compliance of hundreds of subcontractors, and that would be impractical or impossible.

Response: The rule does not require prime contractors to certify the compliance of subcontractors with labor laws. Prime contractors may rely on representations of subcontractors and DOL assessments. With regard to the respondent's concern over a large number of subcontractors, DOL will be available to consult with both contractors and subcontractors, providing early guidance before bidding on a particular subcontract opportunity, to address appropriate remediation, and obtain DOL guidance and assessments (See DOL Guidance Section VI Preassessment).

Comment: One respondent recommended that proposals be required to include a list of subcontractors who will perform work under the contract, to bolster effective checks and balances and reduce "bid shopping."

Response: Bid shopping is the practice of a construction contractor divulging to interested subcontractors the lowest bids the contractor received from other subcontractors, in order for the contractor to secure a lower bid. The Councils are aware of this practice but decline to address it in the rule as the E.O. does not address bid shopping. However, the Councils note that FAR Case 2014–003, Small Business Subcontracting Improvements, will go into effect November 1, 2016. It was published on July 14, 2016 (81 FR 45833). It adds a new requirement to the content of subcontracting plans at FAR 19.704(a)(12) and 52.219–9(d)(12), that the offeror will make assurances that the offeror will make a good faith effort to acquire articles, equipment, supplies, services, or materials, or obtain the performance of construction work from the small business concerns that the offeror used in preparing the bid or proposal, in the same or greater scope, amount, and quality used in preparing and submitting the bid or proposal; the case also describes what is meant by "used in preparing."

Comment: One respondent recommended establishing a single reporting portal for all contractors, both prime and subcontractor, through SAM to aggregate the data and avoid the added expense of creating new databases and interfaces. The respondent stated that having one portal for primes and subcontractors makes sense because many subcontractors sell products to prime or higher tier contractors and also sell directly to the Government.

Response: The E.O. does not contemplate a single Web site for prime contractor and subcontractor disclosures. In Section 4, the E.O. requires establishment of a single database that Federal contractors could use for all Federal contract reporting requirements related to it, and that certain information about disclosed labor law decisions would be included in FAPIIS. The FAR implementation requires that certain basic labor law decision information that contractors enter into SAM will be publicly displayed in FAPIIS. There is no requirement for subcontractor information to be included in SAM or FAPIIS, except for trafficking in persons violation information which is posted to the record of the prime contractor (see FAR 9.104–6(b)(5)). If a subcontractor separately serves as a prime contractor on another Government contract, at that time they will be required to report their information in SAM.

f. Potential for Conflicts When Subcontractors Also Perform as Prime Contractors

Comment: Respondents commented that subcontractors and prime contractors are often competitors in subsequent procurements. One concern was that subcontractor disclosures would lead to increased bid protests because competitors may be a subcontractor on one opportunity and a prime on a future one. One respondent suggested that the subcontractors should be required to disclose violations directly to DOL rather than to prime contractors to address this concern. Another was concerned that having knowledge of a future competitor's labor law violation information would provide an unfair competitive advantage.

Response: The Councils appreciate the concerns of the respondents with respect to the disclosure of information to a potential future competitor. This concern is mitigated by the adoption in the final rule of the alternative approach to subcontractor disclosure whereby subcontractor disclosures are provided to and assessed by DOL instead of by the prime contractor. In the final rule, only under limited circumstances would subcontractors disclose information to a prime contractor (such as when the subcontractor disagrees with DOL advice). See FAR 52.222–59(c)(4)(ii)(C)(*3*).

g. Not Workable Approach for Prime Contractors To Assess Subcontractors' Disclosures

Comment: Respondents discussed the complexities of DOL's Guidance for assessing an entity's reported labor law violations. Two respondents specifically asserted that DOL's Guidance for assessing how an entity's reported labor law violations bear on its integrity and business ethics is detailed and complicated. One respondent asserted that DOL's Guidance does not identify how a prime should consider subcontractor reports and, with a lack of actual standards, one prime may reach one determination while another reached a different conclusion by considering the circumstances at a different level of granularity.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. The final rule is revised at FAR 52.222–59(c) and (d) to implement the alternative approach in the proposed rule for contractors determining the responsibility of their subcontractors, where the contractor directs the subcontractor to consult with DOL on its violations and remedial actions. Under this approach, subcontractors disclose labor law violation details to DOL instead of to the prime contractor. The DOL Guidance provides a consistent approach to consideration of the nature of violations to determine if they are serious, repeated, willful, and/or pervasive under the E.O. The DOL Guidance offers DOL's availability to consult with both contractors and subcontractors that have labor law violations. DOL's assessments of subcontractors, as well as its availability for consultations, are designed to improve consistency of assessments.

Comment: Respondents asserted that subcontractor reporting requirements are unworkable. A respondent specifically claimed that many subcontractors already agree to report to the prime offenses such as OSHA citations, but much of the time the subcontractors fail to actually report. One respondent specifically asserted that because primes are required to obtain from covered subcontractors, at every tier, the same information about Federal and State labor law violations that they must disclose about themselves, the proposed regulation will put contractors at risk of making good-faith representations regarding their subcontractors that could, despite the contractors' due diligence, turn out to be inaccurate or incomplete.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. The E.O. and final rule establish a requirement for prime contractors to require subcontractors to disclose to DOL specified labor law decisions. Under the rule, prime contractors do not make a representation about their subcontractors' disclosures to the Government. Per FAR 9.104–4(a), prime contractors make a determination of subcontractor responsibility by virtue of awarding a subcontract.

Comment: Respondents asserted that reviewing subcontractor labor law violations and reporting requirements will be burdensome, costly, and onerous for the Government and primes to administer and creates unintended consequences for contractor/subcontractor relationships. One respondent specifically asserted that the reporting requirements would create a massive amount of reports to contracting officers and other Government officials charged with evaluating contractor labor law compliance. Respondents specifically asserted the proposed rule imposes detailed obligations for reporting on subcontractors at every tier, and that the Government would need to resolve disagreements between primes and their subcontractors, which would add another dimension to the burden placed on the Government's contract professionals.

Response: The E.O. includes disclosure requirements for contractors and subcontractors, to provide information regarding compliance with labor laws, and for Government review, assessment, and management of the information. As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. This will minimize the burden and address complexities involved with subcontractors reporting to primes. Neither the E.O. nor the rule provides for the Government to resolve differences between primes and subcontractors. Prime contractors have discretion in determining subcontractor responsibility and in deciding whether actions are needed during subcontract performance.

Comment: One respondent asserted that basic data regarding an employer's workforce, such as the location where work is performed, the number of employees working in an establishment or in a job group, how a workforce is organized, and the like, are often considered proprietary or confidential by contractors. The respondent stated that for this reason contractors often object when requests are filed with agencies under FOIA for these or similar types of information and the Government has generally respected such objections. This respondent recommended the FAR Council ensure that contractors are not required to disclose such information to the public or to their competitors.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. This change shifts subcontractor disclosure assessment from the prime contractor to DOL (see FAR 52.222–59(c) and (d)).

Prime contractors and their prospective subcontractors may agree on their own to impose restrictions on the handling of subcontractor information, but the rule does not impose any restrictions. The FAR implementation only compels public disclosure of basic information regarding the prime contractor's labor law decision(s) specifically prescribed in the E.O and does not compel public disclosure of subcontractor information. The rule does not alter or change the requirements of FOIA.

Comment: Respondents suggested that in certain industries, *e.g.,* construction, where a preponderance of work on Federal contracts is performed by subcontractors, the process in the rule for disclosure and assessment of subcontractor labor law violations is neither sufficiently robust nor transparent to achieve the desired objectives of the E.O.

Response: The E.O., through the requirement to flow down to subcontractors at all tiers, recognized that subcontractors and the work performed by subcontractors is significant to Federal procurement. The requirements of the E.O. are sufficient for all industries, including those where a preponderance of work is performed by subcontractors.

Comment: Respondents asserted the proposed model whereby primes consult with DOL to determine subcontractor or supplier responsibility creates an enormous risk for primes and is cost prohibitive for all parties, including many small and nontraditional companies wishing to act as either prime or subcontractor. A respondent claimed that because the risks of an adverse responsibility determination are borne by the prime, the prime would be forced to pursue and compile information and would need sufficient experience, training, or background to determine whether violations are serious, repeated, willful and/or pervasive; and the ability to assess mitigating factors. A respondent contended that contractors would also need to update that information on a regular basis in order to effectively manage risk associated with labor law compliance throughout their supply chain.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. Contractors currently are responsible for taking necessary steps to subcontract with responsible parties and perform adequate subcontract management. The E.O. and its implementation in the final rule make it possible for contractors to conduct a more thorough review of the subcontractor's responsibility because they will now have information and analysis they did not previously have with regard to labor law violations.

While the adoption of the alternative through which subcontractors disclose violations to DOL will mitigate the degree to which contractors may need to do assessments, there clearly is a need for contractor employees who are responsible for subcontract awards and management to have sufficient familiarity with the DOL Guidance and their responsibilities under the rule.

Comment: Respondents supported the E.O. and asserted that there is no incentive for primes to perform the comprehensive assessment outlined in E.O. because primes want to hire subcontractors expeditiously and with as little interference as possible. They contended that unless a subcontractor runs into problems while working on the project, there appears to be no penalty for a prime contractor to deem a putative subcontractor "responsible" after performing a cursory review of its labor law violations.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. The prime contractor's responsibility is to consider DOL's analysis and determine whether to find a subcontractor responsible and whether to take any action regarding the subcontractor. As the final rule minimizes burdens to prime contractors, it should increase prime contractors' ability to fully comply with the requirements of the rule.

Comment: A respondent asserted that neither the proposed rule nor the DOL Guidance establish processes for prime contractors to confirm subcontractors' compliance with the requirements of the rule.

Response: The representation requirement at FAR 52.222–58(b), which flows down to subcontractors at all tiers (see FAR 52.222–59(c) and (g)), will help prime contractors obtain subcontractor compliance. However, as they do with all subcontract requirements, prime contractors will establish processes that they deem necessary for them to validate and maintain subcontractor compliance.

Comment: One respondent asserted that to make compliance efforts even more difficult, the proposed rule requires prime contractors to collect labor law compliance information from subcontractors every six months. This respondent stated that the Government should bear the burden of collecting the information directly, rather than relying on prime contractors to perform this function.

Response: The E.O. requires prime contractors to receive updated subcontractor disclosures so the prime contractors can continue to consider the information and determine whether action is necessary during subcontract performance. As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. This alternative applies to disclosures both before and after subcontract award.

h. Suggestions To Assess Subcontractor Disclosures During Preaward of the Prime Contractor

Comment: One respondent recommended that DOL and ALCAs assess disclosures, and contracting officers make responsibility determinations, for both prime contractors and subcontractors before awarding the prime contract. The respondent asserted that preaward (versus postaward) determinations at all subcontractor tiers will minimize the impact of ineligibility decisions later in the project, due in part to consistent application of DOL Guidance standards throughout the tiers, which in turn will reduce project delay, cost overruns, claims, and disputes.

This respondent also asserted that consolidated agency review of all covered firms at all contracting tiers at the start of the process would bring uniform False Claims Act discipline to the certification process.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. Contractors may encourage potential subcontractors and those within their supply chain to consult with DOL in advance of a specific subcontract opportunity, to address labor law violations. (See DOL Guidance Section VI Preassessment). However, the Councils decline to accept the suggestion to require that all subcontract assessments be accomplished during prime contract preaward. Often circumstances exist whereby contractors identify a need for subcontracts during contract performance, as opposed to before contract award. Therefore, the rule provides language to account for these circumstances in the Compliance with Labor Laws (Executive Order 13673) clause at FAR 52.222–59(c)(2).

Comment: A respondent recommended that contractors submit all subcontractor labor law violation information to the contracting officer, and not just violations relating to a labor compliance agreement. The respondent further suggested that the contracting officer should use the information to evaluate the prime contractor's performance.

Response: A subcontractor's regard for compliance with labor laws may be an indicator of integrity and business ethics. Subcontractors are required to submit labor law decision information to DOL; subcontractor labor law decision information does not automatically go to the contracting officer. The final rule has been revised to require contracting officers to consider the extent to which the prime contractor addressed labor law decisions rendered against its subcontractors, when preparing past performance evaluations (see FAR 42.1502(j)).

i. Suggestion for the Government To Assess Subcontractor Responsibility

Comment: One respondent recommended creating a preclearance program to facilitate Government reviews of subcontractor responsibility and to streamline this process.

Response: Prospective contractors and subcontractors with labor law violations are encouraged to consult early with DOL, in accordance with the DOL Guidance (at Section VI, Preassessment) to obtain guidance, request assessments, and address appropriate remediation. These opportunities for early engagement are available to prospective contractors and subcontractors prior to and not tied to any specific contract or subcontract opportunity. The Councils do not accept the suggestion for the Government to perform or review subcontractor responsibility. Contractors are responsible for making subcontractor responsibility determinations. The Government determines subcontractor responsibility only in those rare instances when it is critical to the Government's interest or the particular agency's mission to do so. See 9.104–4(b).

Comment: Respondents advocated that the Government not only assess a subcontractor's labor law violation history, but also directly conduct subcontractor responsibility determinations. Respondents noted that the language at FAR 9.104–4(a) does not require the contractor to conduct a responsibility determination of its subcontractor and at FAR 9.104–4(b) allows the Government to do so.

Response: Contractors are responsible for making subcontractor responsibility determinations. The Government determines subcontractor responsibility only in those rare instances when it is critical to the Government's interest or the particular agency's mission to do so (see FAR 9.104–4(b)). In this case, the E.O. does not direct changes to how subcontractor responsibility will be conducted by the prime contractor, it simply provides a means by which prime contractors will receive relevant information to consider. The Councils find the processes established in this rule enable prime contractors to effectively assess subcontractor labor law violation information, in consultation with DOL.

Comment: A respondent acknowledged DOL's role is to advise and provide technical assistance on compliance issues, which is consistent with their enforcement agency role. The respondent recommended that DOL not make responsibility determinations for subcontractors, as DOL does not have the same level of experience and expertise in these matters as ALCAs and contracting officers.

Response: The Councils concur that DOL's knowledge and technical expertise support its role to provide assistance in analyzing and assessing labor law compliance. Under the rule, DOL and ALCAs provide advisory assessments that inform responsibility determinations made by others. Contracting officers alone make responsibility determinations on prime contractors; contractors make the responsibility determinations for subcontractors.

Comment: In cases where DOL has determined that the subcontractor has not entered into a labor compliance agreement within a reasonable period or has not complied with the terms of such an agreement, a respondent recommended that the contractor should provide the contracting officer with a heightened explanation of the contractor's need to proceed with an award to the subcontractor and should provide information demonstrating the additional remedial measures that the subcontractor took before subcontract award.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. The final rule adopts the alternative language at FAR 52.222–59(c)(5) and (d)(4), which requires that the prime contractor provide the contracting officer with the name of the subcontractor and the basis for the contractor's decision for proceeding with the subcontract (*e.g.*, relevancy to the requirement, urgent and compelling circumstances, preventing delays in contract performance, or when only one supplier is available to meet the requirement).

Comment: A respondent cited concerns that smaller subcontractors may seek advice from the contractor's legal counsel regarding the subcontractor's labor law violation history, creating potential ethical issues for the contractor's legal counsel, whose legal responsibility does not extend to the subcontractor.

Response: DOL's Guidance encourages prospective contractors and subcontractors with labor law violations to consult early with DOL, to obtain guidance, request assessments, and address appropriate remediation. As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. The concern that the respondent describes is not unique to the E.O.; a prime contractor's legal counsel will always need to consider possible ethical issues when providing advice to a subcontractor. However, in the application of the E.O., this concern is addressed, in part, by the Councils' adoption of the alternative subcontractor disclosure approach in the FAR rule, whereby prime contractors direct their subcontractors to provide their labor law violation information to DOL and DOL assesses the violations. In addition, DOL's Guidance encourages prospective contractors and subcontractors with labor law violations to consult early with DOL, to obtain guidance, request assessments, and address appropriate remediation. DOL's advice may reduce a subcontractor's need to seek legal advice from outside counsel.

j. Miscellaneous Comments About Subcontractor Disclosures

Comment: One respondent recommended the process of evaluating subcontractors' labor law compliance history be done by DOL as an inherently governmental function.

Response: In accordance with FAR 9.104–4(a), contractors make subcontractor responsibility determinations. Assessment of information considered in subcontract responsibility is not inherently governmental. There is no transfer of enforcement of the labor laws as a result of the rule; the rule provides information regarding compliance with labor laws to be considered during subcontract responsibility determinations and during subcontract performance.

Comment: Respondents recommended that prime contractors be required to consult with DOL if any prospective subcontractor discloses workplace law violations.

Response: As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. The final rule has been revised at FAR 52.222–59(c) and (d) to incorporate this alternative whereby subcontractors provide their labor law violation information to DOL. Based on the subcontractor's submission, DOL provides its assessment to the subcontractor, who provides this information to the prime. Consultation with DOL is available to prime contractors, but is not required.

Comment: Respondents inquired about the DOL consultation timeframe, and one respondent suggested that DOL have 30 days to assess subcontractor violations. Respondents suggested DOL should be open to performing "preclearance" assessments before a subcontractor bids on a subcontract to expedite matters when an actual procurement is underway.

Response: If a subcontractor requests DOL's assessment to support a specific subcontracting opportunity and does not receive DOL's response within 3 business days, and DOL did not previously advise the subcontractor that it needed to enter into a labor compliance agreement, the prime contractor may proceed with making a subcontractor responsibility determination without DOL's input, using available information and business judgment (see FAR 52.222–59(c)(6)). The rule does not specify a time limit for DOL to conduct its assessment. Subcontractors do not need to wait until responding to a specific opportunity in order to request DOL's review of their labor law violation history. DOL will be available to consult with contractors and subcontractors to assist them in fulfilling their obligations under the E.O. (See DOL Guidance Section VI, Preassessment).

Comment: One respondent commented that 3 business days is not a reasonable or appropriate amount of time for DOL to make an accurate and complete determination. The respondent indicated that any period shorter than 3 business days will not allow the Government to properly assess contractors with track records of compliance. The respondent pointed out that the DHS joint rulemaking on the labor certification process for H–2B temporary workers allows DOL Certifying Officers 7 business days to examine, assess, and respond to an employer's Application for Temporary Employment Certification.

Response: Allowing more than 3 business days for response from DOL could, in some circumstances, cause delays to subcontract awards and delivery of needed goods and services. Most offerors submit offers on multiple solicitations and DOL will have an opportunity to do a thorough and complete assessment of a subcontractor's labor law violations.

Comment: One respondent recommended that a prime contractor be required to submit to DOL its communications with subcontractors with regard to the subcontractor's reporting requirements and consequences for labor law violations.

Response: The E.O. and rule do not require a prime contractor to submit to DOL its communications with subcontractors regarding the subcontractor's reporting requirements and consequences for labor law violations. As described in the Introductory Summary to this section III.B.5., the final rule implements the alternative approach for subcontractor disclosures. Based on the subcontractor's submission, DOL provides its assessment to the subcontractor, who provides this information to the prime contractor. This direct communication between DOL and the prospective subcontractor provides for a dialogue on the consequences for labor law violations.

Comment: One respondent asked what would happen on an instant acquisition if DOL provides its advice subsequent to the prime contractor's responsibility determination and the two are inconsistent.

Response: Under FAR 52.222–59(c)(6), if DOL does not provide its advice with respect to the subcontractor's labor law decisions within 3 business days, the prime contractor is authorized to proceed with its determination of subcontractor responsibility. If the advice from DOL is received prior to subcontract award, the Government would expect the prime to assess the impact of that information on its subcontract award decision, consistent with prudent business practice. If the advice from DOL is received subsequent to subcontract award, the contractor should consider the information in a manner similar to information received for semiannual update purposes at FAR 52.222–59(d) and determine if any action is appropriate or warranted.

Comment: One respondent asked how long each contractor would have to retain subcontractors' information, and whether a contractor would be required to disclose information under Federal and State public information statutes.

Response: The rule does not affect existing records retention or public disclosure statutes or policies under Federal and State public information statutes (*e.g.,* FAR subpart 4.7, Contractor records retention).

Comment: One respondent recommended that prime contractors be responsible for making contracting officers aware that DOL has determined that a prospective or existing subcontractor has not entered into a labor compliance agreement within a reasonable period or is not meeting the terms of the agreement. The respondent further recommended that subcontractors be required to disclose DOL's concerns to the prime contractor and DOL be required to directly inform the prime contractor.

Response: The FAR rule requires the subcontractor to make the prime contractor aware of DOL assessments and this process preserves the prime-subcontractor contractual relationship. The requirements in the revised final rule, appearing in FAR 52.222–59(c)(5) and (d)(4), for the prime contractor to notify the contracting officer are sufficient.

6. ALCA Role and Assessments

Introductory Summary: The agency labor compliance advisor (ALCA) is defined at FAR 22.2002 as "the senior official designated in accordance with Executive Order 13673. ALCAs are listed at *www.dol.gov/fairpayandsafeworkplaces.*" The ALCA is a senior agency official who serves as the primary official responsible for the agency's implementation of Executive Order 13673, Fair Pay and Safe Workplaces. ALCAs will play a key new role in agencies, promoting awareness of and respect for the importance of labor law compliance through their interactions with senior agency officials, contracting officers, and contractors, while also meeting regularly with DOL and ALCAs from other executive departments and agencies to formulate effective and consistent practices Governmentwide.

In the procurement process ALCAs will provide support to contracting officers as technical advisors lending expertise in the subject area of labor law compliance. ALCAs provide analysis and advice, including a recommendation, to the contracting officer regarding disclosed labor law violations (including mitigating factors and remedial measures) for the consideration of contracting officers when conducting responsibility determinations and during contract performance. The ALCA's analysis includes an assessment of whether the disclosed violations are of a serious, repeated, willful, and/or pervasive nature; consideration of mitigating factors; and whether the contractor has taken steps to adequately remedy the violation(s). The ALCA's advice to the contracting officer may address whether a labor compliance agreement is warranted given the totality of circumstances, and the status of prior advice that a labor compliance agreement was warranted.

ALCA tasks are addressed in FAR 22.2004–1(c), 22.2004–2(b), and 22.2004–3(b).

Nothing in the phase-in relaxes the ongoing and long-standing requirement for agencies to do business only with contractors who are responsible sources and abide by the law, including labor laws. Accordingly, if information about a labor law decision is brought to the attention of the ALCA indicating that a prospective prime contractor has been found within the last three years to have labor law violations that warrant heightened attention in accordance with DOL's Guidance (*i.e.,* serious, repeated, willful, and/or pervasive violations), the contracting officer, upon receipt of the information from the ALCA, shall provide the contractor with an opportunity to review the information and address any remediation steps it has taken. Based on this input, which shall be provided to the ALCA, the ALCA may recommend measures to the contracting officer to further remediate the matter, including seeking the prospective contractor's commitment to negotiate a labor compliance agreement or other remedial measures with the enforcement agency, which the contracting officer must then consider. If the violations showed a basic disregard for labor law, or the contractor refused to comply with the recommended remediation measures, the ALCA's recommendation might advise the contracting officer that the prospective contractor has an unsatisfactory record of labor law compliance which may contribute to a contracting officer's determination of nonresponsibility. For this reason, entities seeking to do business with the Government are strongly encouraged to work with DOL in their early engagement preassessment process to obtain compliance assistance if they identify covered labor law decisions involving violations that they believe may be serious, repeated, willful, and/or pervasive. This assistance is available to entities irrespective of whether they are responding to an active solicitation. Working with DOL prior to competing for Government work is not required by this rule, but will allow the entity to focus its attention on developing the best possible offer when the opportunity arises to respond to a solicitation.

a. Achieving Consistency in Applying Standards

Comment: Respondents speculated that ALCAs would perform their duties with unclear standards and ambiguous criteria.

Response: The E.O. expressly requires the creation of processes to ensure

Governmentwide consistency in its implementation. The DOL Guidance was developed to provide specific guidelines for ALCAs, contractors, and contracting officers. In addition, ALCAs will work closely with DOL during more complicated assessments. This level of coordination will ensure that ALCAs receive expert guidance and instruction.

Comment: Respondents expressed concern that ALCAs at different agencies, when reviewing the same information regarding a contractor's labor law violations, would come to inconsistent conclusions as to whether a violation is of a serious, repeated, willful, or pervasive nature and whether actions, such as termination of a contract, are warranted. Similarly, respondents expressed concern that contracting officers across various agencies will make inconsistent decisions regarding responsibility and appropriate remedies.

Response: The DOL Guidance provides specific guidelines for weighing and considering violations (see DOL Guidance Section III.B.), which will foster consistency. Likewise, DOL is available to provide advice and assistance, and ALCA coordination across agencies will occur, as appropriate. The final rule, consistent with the proposed rule, does not require the ALCA to advise the contracting officer regarding which postaward contractual remedies to take, such as contract termination. The Government is employing measures to achieve consistency in ALCA analysis of labor law violation information, but contracting officer responsibility determinations and postaward decisions are intended to be arrived at independently. There is no change to existing requirements for contracting officers to make independent determinations on contractor responsibility (see FAR subpart 9.1). The ALCA provides contracting officers with analysis and advice, in addition to a specific recommendation, which does not disturb the contracting officer's independent authority in determining responsibility. Contracting officers consider assessments provided by ALCAs consistently with advice provided by other subject matter experts. Contracting officer responsibility determinations and procurement decisions are made in the context of the specific requirements of each procurement; lockstep consistency in such determinations and decisions is not expected, appropriate, or required. (See also Section III.B.1. above).

b. Public Disclosure of Information

Comment: Respondent requested that ALCAs' annual reports contain, as separate elements, the number of contractors and subcontractors reporting labor law violations, the names of contractors entering into labor compliance agreements, the names of contractors failing to comply with their labor compliance agreements, and the number of violations that have been cured as a result of remedial actions.

Response: The FAR implementation does not cover the E.O. Section 3, Labor Compliance Advisors, in its entirety; the FAR implementation is limited to ALCA duties necessary for contracting officer execution of procurement actions. Thus, the FAR does not cover the specifics of the ALCA's annual report described in E.O. Section 3(h).

Comment: Respondent recommended that the final Guidance and regulation specify that a public database publish ALCA recommendations regarding responsibility, contracting officer final responsibility determinations and any labor compliance agreements referenced as part of the contracting officer's determination.

Response: The additional information requested by the respondent is not required by the E.O. In addition, as part of the responsibility determination, the contracting officer considers the ALCA's assessment of a contractor's labor compliance history. Per FAR 9.105–3, information accumulated for purposes of determining the responsibility of a prospective contractor shall not be released or disclosed outside the Government (this does not apply to information publicly available in FAPIIS). The existence of a labor compliance agreement entered into by the prime contractor will be public information. See FAR 22.2004–1(c)(6).

c. Sharing Information Between ALCA and Contracting Officer

Comment: A respondent recommended that ALCAs be required to "pass on" to the contracting officer additional information that the contractor may have submitted demonstrating a commitment to compliance.

Response: The final rule has been revised to require that information to demonstrate responsibility and commitment to compliance (including mitigating factors and remedial measures such as contractor actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws) is provided in SAM (FAR 22.2004–2(b)(1)(ii), 22.2004–3(b)(2)). The ALCA, in providing analysis and advice to the contracting officer, provides such supporting information that the ALCA finds to be relevant, which may include discussion of mitigating factors and remedial measures.

Comment: A respondent noted concerns that Congress may not fund the President's fiscal year 2016 budget request for an office of labor compliance within DOL that would be staffed by 15 Federal employees at a cost of $2.6 million.

Response: DOL and the FAR Council are committed to fulfilling their duties under the E.O.

d. Respective Roles of Contracting Officers and ALCAs in Making Responsibility Determinations

Comment: Respondents expressed concern that ALCAs and DOL, rather than contracting officers, would decide which contractors are deemed responsible to receive contract awards.

Response: Contracting officers determine the responsibility of prime contractors. DOL is available to the ALCA for coordination and assistance, and the ALCA provides analysis and advice for use by the contracting officer. Neither DOL nor the ALCA make responsibility determinations. The FAR provides for advisory input by technical subject matter experts to assist contracting officers. For example, see FAR 1.602–2(c) which requires contracting officers to request and consider the advice of specialists in audit, law, engineering, information security, transportation, and other fields, as appropriate.

Comment: Respondent speculated that contracting officers will inevitably receive pressure from ALCAs, and that ALCA inputs may drive contracting decisions.

Response: According to FAR 1.602–1(b), no contract shall be entered into unless the contracting officer ensures all requirements of law, executive orders, regulations, and all other applicable procedures have been met. As advisors to the contracting officer, ALCAs provide an assessment of labor law violation information, including mitigating factors and remedial information, for the contracting officer's consideration during the responsibility determination process. ALCAs, like other technical expert advisors to the contracting officer, may provide inputs that are persuasive; however, the ultimate determination of responsibility is the contracting officer's.

Comment: Respondents recommended that contracting officers be required to document reasons for not complying with ALCA recommendations, and that agencies be required to track compliance and publicly report the results on a regular basis.

Response: The final rule has been revised at FAR 22.2004–2(b)(5)(ii) and 22.2004–3(b)(4) to require contracting officers to place the ALCA's written analysis into the file and explain how it was considered. Preaward procurement-specific information is protected from release outside the Government per FAR 9.105–3, as it relates to the responsibility of a prospective contractor. Separately, the E.O. at Section 3(h) requires agencies to publicly report agency actions in response to serious, repeated, willful, and/or pervasive violations, which agencies will implement in a manner suitable to protecting procurement-specific information, *e.g.,* on a cumulative basis.

Comment: Respondent suggested that contracting officers not complying with ALCA recommendations of nonresponsibility be required to seek and obtain concurrence and approval from the senior agency procurement official.

Response: ALCAs are advisors to the contracting officer. As part of the ALCA analysis and advice, ALCAs make a recommendation about whether the prospective contractor's record supports a finding by the contracting officer of a satisfactory record of integrity and business ethics (see FAR 22.2004–2(b)(3)). ALCAs provide analysis and advice on one aspect of responsibility: Integrity and business ethics regarding labor law violations. Contracting officers consider the information provided by advisors such as ALCAs, as well as advice from other experts. The FAR generally does not require higher-level review and approval of a contracting officer's responsibility determination.

Comment: Respondents alleged that ALCA determinations violate contractor due process rights.

Response: According to FAR 1.602–1(b), no contract shall be entered into unless the contracting officer ensures all requirements of law, executive orders, regulations, and all other applicable procedures have been met. ALCAs provide input to be considered during the contracting officer's responsibility determination process; however, ALCAs are advisors to contracting officers and do not make responsibility determinations. The assessments of ALCAs do not violate prospective contractors' due process rights, because ALCAs are advisors to the contracting officer in the well-established responsibility determination process. Neither the E.O. nor the final rule affects contractors' rights to administrative hearings. (See also Section III.B.1. above.)

Comment: Respondents alleged that ALCA determinations have the potential to result in *de facto* debarments. Specifically, respondents alleged there is a danger that one ALCA determination and a subsequent contracting officer decision, finding a contractor nonresponsible, would be improperly copied across the Government on multiple contract actions.

Response: ALCAs provide analysis and advice to contracting officers about one aspect of offeror responsibility; it is the contracting officer who makes the final responsibility determination. In addition, as required by FAR 9.105–2(b)(2)(i), contracting officers must publish in FAPIIS nonresponsibility determinations on acquisitions above the simplified acquisition threshold. If the contracting officer finds nonresponsibility determinations previously submitted in FAPIIS under FAR 9.105–2 because the contractor does not have a satisfactory record of integrity and business ethics, FAR 9.104–6(c) requires the contracting officer to notify the agency official responsible for initiating suspension and debarment action if the information appears appropriate for consideration. This FAR requirement for suspension and debarment notification is intended to prevent *de facto* debarments. There is no evidence that nonresponsibility determinations have been improperly "copied" across the Government on multiple contract actions. (See also Section III.B.1. above.)

Comment: Respondents raised concerns that the potential of an ALCA making a nonresponsibility recommendation would lead to coercive efforts against potential contractors to enter into labor compliance agreements.

Response: ALCA assessments are provided to the contracting officer, who considers a range of information on various aspects of responsibility. An ALCA's analysis may indicate to the contracting officer that a labor compliance agreement is warranted. A contracting officer will notify the contractor that the ALCA has advised that a labor compliance agreement is warranted. See FAR 22.2004–2(b)(7) and 22.2004–3(b)(4)(i)(B)(*1*). There is no evidence to suggest that ALCAs or contracting officers would act inappropriately in executing their respective duties and responsibilities.

Comment: Respondent recommended procuring agencies engage in a dialogue between offerors and ALCAs prior to award, suggesting that a great deal of transparency between the Government and individual contractors is necessary.

Response: The rule provides for exchange of information in FAR 22.2004–2(b)(1)(ii) and 52.222–57(d)(1)(iii), where each prospective contractor has an opportunity to provide additional information to the contracting officer it deems necessary to demonstrate its responsibility, *e.g.,* mitigating factors, remedial measures, etc. The ALCAs are advisors to contracting officers, and as such, ALCA dialogue with potential offerors is not available to the public. Additionally, the DOL Guidance provides transparency in the form of early engagement preassessment opportunities for prospective contractors.

Comment: Respondents were concerned that the role of the ALCA is not consistent with, or usurps, the duties of contracting officers and debarring officials.

Response: ALCAs are advisors to contracting officers in the field of labor law; their provision of analysis and advice is consistent with the advisory role of other specialists consulted by contracting officers (FAR 1.602–2(c)), and with the role of the contracting officer in making final decisions in contracting matters. In addition, the ALCA functions and duties are separate and distinct from the suspension and debarment process.

e. Number of Appointed ALCAs, ALCA Expertise, and ALCA Advice/Analysis Turn-Around Time Insufficient

Comment: Respondents raised concern over the language at Section 3 of the E.O., which reads in part "[e]ach agency shall designate a senior agency official to be an [ALCA]." Respondents were concerned that each agency would have only one ALCA available to assist contracting officers in analyzing and responding to labor law violations, and as a result, ALCAs at certain agencies with a high volume of contract work would cause delays in the procurement process.

Response: The E.O. requires each agency to designate a senior agency official to serve as the agency's labor compliance advisor, and it would be beyond the authority of this rule to require agencies to appoint more than one ALCA. However, agencies have discretion to develop an appropriate support structure to allow for successful implementation of the ALCA's responsibilities. For example, an agency has one General Counsel, one Chief Financial Officer, one Chief Acquisition Officer, and one Chief Information Officer, but each has support staff. In response to the concern about delays in the procurement process, if an ALCA does not reply in a timely manner, the contracting officer has the discretion to make a responsibility determination using available information and business judgment (see FAR 22.2004–2(b)(5)(iii)).

Comment: Respondents, including the SBA Office of Advocacy, raised concerns that three business days were insufficient time for an ALCA to provide written advice and recommendations to contracting officers during the preaward assessment of an offeror's labor law violations.

Response: As stated at FAR 22.2004–2(b)(2)(i), contracting officers shall request that ALCAs provide written analysis and advice "within three business days of the request, or another time period determined by the contracting officer." The time period for an ALCA to provide written advice to a contracting officer is adjustable according to contracting officer requirements; however, the standard timeframe is three business days. If an ALCA response is not timely, the contracting officer has the discretion to make a responsibility determination using available information and business judgment (see FAR 22.2004–2(b)(5)(iii)). Additionally, contractors and subcontractors are encouraged to avail themselves of the preassessment process to consult with DOL in advance of a particular procurement opportunity, which will facilitate processes during procurements (see DOL Guidance Section VI Preassessment).

Comment: Respondents raised concerns about the lack of guidance regarding training, knowledge and expertise required for an individual to be qualified for appointment as an ALCA. Respondents recommended that ALCAs have training in labor law and the role of labor organizations in order to assist them in understanding and evaluating the various labor laws identified in FAR 22.2002 of the rule.

Response: The Government has issued internal guidance to agencies identifying ALCA's appropriate qualifications and expertise. See OMB Memorandum M–15–08, March 6, 2015, Implementation of the President's Executive Order on Fair Pay and Safe Workplaces. Agencies will consider the knowledge, training, and expertise of individuals they appoint to fulfill ALCA duties as they do for all other positions, as well as relevant factors, including an individual's demonstrated knowledge and expertise in Federal labor laws and regulations enumerated in the E.O. Agencies are responsible for ensuring that ALCAs have sufficient training to perform their duties. In addition, the Government plans to develop internal policies and operating procedures for ALCAs.

7. Labor Compliance Agreements

Introductory Summary: Discussion of labor compliance agreements in the DOL and FAR Preambles and coverage in the final DOL Guidance and FAR rule have been reviewed for consistency. Discussion of public comments and responses submitted on the topic of labor compliance agreements is found in the DOL Preamble Section by Section Analysis at Section III. Preaward assessment and advice, C. Advice regarding a contractor's record of Labor Law compliance; coverage of labor compliance agreements in the DOL Guidance is also in Section III. Preaward assessment and advice, C. Advice regarding a contractor's record of Labor Law compliance.

Labor compliance agreements are defined at FAR 22.2002 as "an agreement entered into between a contractor or subcontractor and an enforcement agency to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with the labor laws, or other related matters." The ALCA reviews disclosed labor law violation information (including mitigating factors and remedial measures) and, using DOL Guidance, provides analysis and advice for the contracting officer to consider when assessing the prospective contractor's present responsibility (FAR 22.2004–2(b)(3) and (4)) and when determining if remedial action is required during contract performance (FAR 22.2004–3(b)(3)). If an ALCA includes in its analysis a notification to the contracting officer that a labor compliance agreement is warranted, the contracting officer will provide written notice to the prospective contractor. For preaward assessments, the contracting officer's notice will state that the ALCA has determined a labor compliance agreement is warranted, identify the name of the enforcement agency, and either require the labor compliance agreement to be entered into before award, or require the prospective contractor to provide a written response to the contracting officer regarding the prospective contractor's intent (see FAR 22.2004–2(b)(7)). For postaward assessments, the contracting officer will follow similar procedures in issuing a written notification that a labor compliance agreement is necessary (see FAR 22.2004–3(b)(4).

The Government's objective is to maximize efficiency by negotiating a single labor compliance agreement whenever possible. Occasionally, a single labor compliance agreement may not be feasible. The Government anticipates having a single point of contact within each enforcement agency for coordinating labor compliance agreements involving more than one enforcement agency.

a. Requirements for Labor Compliance Agreements

Comment: Respondents expressed differing views on whether a labor compliance agreement should be required as a prerequisite for a contract award and to continue contract performance. One view was that a labor compliance agreement is unnecessary because it is not clearly linked to a specific labor problem. Another requested the rule require all contractors and subcontractors who violate labor laws during their contract performance period to enter into a labor compliance agreement. Several respondents proposed that labor compliance agreements be incorporated into contracts as mandatory contract clauses.

Response: A labor compliance agreement is not necessarily a prerequisite for a responsibility determination, award, or continued performance at either the contract or subcontract level. An assessment providing that a labor compliance agreement is warranted for a prospective contractor is but one data point that a contracting officer will consider in determining responsibility and may or may not have bearing on an award decision. Contracting officers have discretion and may find responsibility or nonresponsibility in the absence of a labor compliance agreement as each responsibility determination is fact specific. An ALCA assessment providing that a labor compliance agreement is warranted for a performing contractor will result in the contracting officer taking appropriate action, which will include providing written notification to the contractor that a labor compliance agreement is necessary or exercising a contract remedy (see FAR 22.2004–3(b)(4)).

Comment: Respondents requested that the rule explicitly state when a labor compliance agreement will be required.

Response: When labor law violations are of a serious, repeated, willful, and/or pervasive nature, the ALCA may recommend to the contracting officer that a labor compliance agreement is warranted, after taking a holistic view of the totality of circumstances including consideration of mitigating factors and remedial measures. The contracting officer will notify the offeror in writing if negotiation of a labor compliance agreement is warranted.

b. Negotiating Labor Compliance Agreements

Comment: Respondent opposed the negotiation of labor compliance agreements with multiple labor and employment agencies across the Government, due to the expected inefficiency of having several parties involved in the negotiation process.

Response: As stated in the introduction to this section, the Government's goal is maximizing efficiency and negotiating a single labor compliance agreement where feasible.

Comment: Respondent expressed concern that there was no assurance of fairness in the labor compliance agreement process because the proposed rule and Guidance fail to include any recourse for a contractor to challenge the fairness of the labor compliance agreement negotiation process.

Response: The FAR rule provides opportunities both preaward and postaward for contractors to provide relevant information to the contracting officer. Such relevant information could include information on difficulties in negotiating with enforcement agencies. Similar opportunities are provided for subcontractors to provide information to DOL. Labor compliance agreements, however, are negotiated with enforcement agencies, not procurement agencies, and therefore specific processes for entering into labor compliance agreements are not covered in the FAR rule.

Comment: A respondent objected to the expectation in the proposed rule and DOL Guidance that contractors would execute labor compliance agreements to demonstrate efforts to mitigate labor law violations.

Response: The objective of the E.O. is to enhance economy and efficiency by improving compliance with labor laws. There are many methods and mechanisms available to contractors to improve their compliance with labor laws. Labor compliance agreements are one such mechanism that is made available for those contractors whose labor law violation information (including mitigating factors and remedial information) is such that a contracting officer may find them nonresponsible absent some affirmative action to address concerns identified by the ALCA analysis. If other remedial measures have been employed such that, when considering the totality of the circumstances, the ALCA does not find further actions are warranted, the analysis and advice to the contracting officer will reflect this.

c. Settlement Agreements and Administrative Agreements

Comment: Respondent expressed concern that labor compliance agreements are ill-defined in the regulation and seem to be viewed by the Government as a cure-all for all alleged labor law violations.

Response: Labor compliance agreements are one way a contractor can demonstrate that it has taken steps to resolve issues to increase compliance with the labor laws. Neither the rule nor the DOL Guidance anticipates that labor compliance agreements will be seen as a cure-all or warranted in every situation. As delineated in the DOL Guidance, labor compliance agreements will be considered in circumstances where labor law violations are classified as serious, repeated, willful, and/or pervasive and have not been outweighed by mitigating factors.

Comment: A respondent expressed concern that labor compliance agreements will duplicate settlement agreements to resolve labor litigation or administrative agreements executed to resolve suspension and debarment matters.

Response: Labor compliance agreements, settlement agreements, and administrative agreements have similar objectives in addressing labor law violations and remedial actions; however, they differ in their specific purposes. Remediation efforts for individual cases, such as settlement agreements, are entered into to address specific violations. Administrative agreements, although they may address broader concerns, resolve issues concerning present responsibility during suspension and debarment proceedings. The objective is that labor compliance agreements will not duplicate or conflict with existing settlement agreements or administrative agreements. In determining whether a labor compliance agreement is necessary, the ALCA will consider information about mitigating factors provided by the contractor. If the contractor provides information about preexisting settlement or administrative agreements in the mitigating information, the ALCA will necessarily consider them. After conducting a holistic review of the totality of relevant information, the ALCA will advise that a labor compliance agreement may be warranted notwithstanding any prior agreements. DOL similarly will take a holistic view of the totality of relevant information when considering whether a labor compliance agreement is warranted in the case of a subcontractor. (See also Section III.B.1.d. above.)

d. Third Party Input

Comment: Respondents requested the regulation create a process for third parties such as unions, worker centers, advocates and subcontractors to have input in the following areas regarding labor compliance agreements:

- Reporting labor law violations to the contracting officer,
- Providing input into the terms of labor compliance agreements, and
- Providing information on contractor compliance with labor compliance agreements.

Response: Under current procurement practices, interested third parties may report relevant information, including labor law violations, to the contracting officer and to the appropriate enforcement agency. Consistent with these current practices, third parties may provide relevant information regarding compliance or noncompliance with labor compliance agreements to the contracting officer, ALCA, and to the appropriate enforcement agency. Enforcement agencies will follow internal policies and procedures as they negotiate and enter into labor compliance agreements with contractors. However, to increase awareness that current practices will apply to issues of labor law compliance, the final rule has been revised at FAR 22.2004–3(b)(1) to indicate that at the postaward stage ALCAs will consider labor law decision information received from sources other than SAM or FAPIIS.

e. Consideration of Labor Compliance Agreements in Past Performance Evaluations

Comment: Respondents requested that the rule clarify that when a contractor violated a labor compliance agreement or refused to enter into one, the contracting officer should document this in a past performance evaluation. Another respondent opposed doing so as being excessive since the contracting officer has existing tools available to address noncompliance with a labor compliance agreement.

Response: Although the Councils did not adopt the alternative supplemental FAR language (22.2004–5 Consideration of Compliance with Labor Laws in Evaluation of Contractor Performance) presented for consideration in the proposed rule preamble, the Councils sought to achieve a balance between providing reasonable opportunities for contractors to initiate and implement remedial measures and taking appropriate action when remediation is not adequate or timely. In order that compliance with labor laws is considered during source selection when past performance is an evaluation factor, the final rule has been revised to include language at FAR 42.1502(j) requiring that past performance evaluations shall include an assessment of contractor's labor violation information when the contract includes the clause at 52.222–59. FAR 22.2004–1(c)(2) describes the ALCA's role in providing input to the individual responsible for preparing and documenting past performance in Contractor Performance Assessment Reporting System.

f. Public Disclosure of Labor Compliance Agreements and Relevant Labor Law Violation Information

Comment: Respondents made recommendations for public disclosure of certain information and suggested the establishment of a user-friendly public database for implementation of Section 2 of the E.O. The types of information suggested included:

- All workplace law violations;
- Labor compliance agreements;
- Mitigating factors and remedial measures;
- DOL and ALCA recommendations, including their underlying reasoning; and,
- Lists of companies undergoing labor law violation assessments and those not meeting the terms of their labor compliance agreements.

Response: The E.O. did not prescribe that the specific information respondents identified be made public or included in a public database. However, the final rule provides language at FAR 22.2004–2 and 22.2004–3 for public disclosure of certain relevant labor law decision information.

Under FAR 22.2004–2(b), 52.212–3(s) and 52.222–57, prospective contractors are required to represent whether the prospective contractor has labor law decisions rendered during the disclosure period. This representation will be public information in FAPIIS. See FAR 52.212–3(s)(5) and 52.222–57(f).

If the contracting officer initiates a responsibility determination, the prospective contractor discloses in SAM certain information for each labor law decision. This information will be publicly available in FAPIIS. See FAR 52.212–3(s)(3) and 52.222–57(d). Also in SAM, contractors will provide additional information they deem necessary to demonstrate responsibility, including mitigating factors and remedial measures, which may include labor compliance agreements. This information will not be made public unless the contractor determines that it wants this information to be made public. See FAR 52.212–3(s)(3) and 52.222–57(d). A similar process is outlined in FAR 22.2004–3 and 52.222–59 for postaward updates of labor law decision information, if there are new labor law decisions or updates to previously disclosed labor law decisions. The existence of a labor compliance agreement will be public in FAPIIS. See FAR 22.2004–1(c)(c)(6). These processes are designed to strike a balance between ensuring the Government has access to the information necessary to make an informed analysis of a contractor's labor law violation information and informed procurement decisions and recognizing the potentially sensitive nature of relevant labor law violation information.

Comment: One respondent recommended that DOL should regularly publish lists of companies undergoing responsibility investigations, as well as the names of contractors that have not entered into a labor compliance agreement in a timely manner or are not meeting the terms of an existing agreement.

Response: The E.O. does not direct DOL to publicly publish information suggested by the respondent; however, such information will be available to ALCAs in performing their assessments of offerors and contractors. While recognizing the value of transparency, the Councils have concluded that it is also appropriate to protect sensitive information and have limited the public exposure of information.

g. Labor Compliance Agreement—Suggested Improvements, Including Protections Against Retaliation

Comment: Many respondents offered suggestions to improve the labor compliance agreement process, including:

- A labor compliance agreement should contain provisions protecting employees against retaliation when they lodge complaints under a labor compliance agreement.
- Contractor employees should participate in developing a labor compliance agreement and process.
- Labor compliance agreement enforcement should be centralized in DOL, and any labor compliance agreement should be entered into between the DOL and/or Occupational Safety and Health Review Commission and the contractor.
- A labor compliance agreement should not modify or supplant the terms of existing remediation agreements.
- Specific guidance should exist on what should be included in a labor compliance agreement, to include a list of specific elements.
- Additional guidance should be provided to ensure future compliance with workplace laws, including plans for enhanced reporting, notice, and protection for workers to safeguard against future violations.

Response: E.O. 13673 does not provide for protection, beyond the existing anti-retaliation protection included in statutes such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the statutes regarding whistleblower protections for contractor employees (see FAR subpart 3.9). Therefore, the rule does not create additional protections. Complaints related to labor compliance agreements will be addressed in accordance with the policies and procedures of the relevant enforcement agency. The enforcement agencies, which will be party to the labor compliance agreements, will negotiate the terms of each labor compliance agreement on a case-by-case basis, taking into consideration the totality of the circumstances.

- A labor compliance agreement is negotiated between contractors and enforcement agencies, and E.O. 13673 does not provide for input from third parties into their negotiation.
- As stated in the introduction to this section, the Government's goal is to negotiate a single labor compliance agreement where feasible and to appoint a single contact within each enforcement agency for coordination. Each enforcement agency has a unique jurisdiction, and E.O. 13673 does not alter these jurisdictions or shift jurisdictional authority to DOL for labor compliance agreements.
- When an enforcement agency negotiates a labor compliance agreement with a contractor, it will have access to existing remediation agreements. The Government does not anticipate duplicate or conflicting terms among agreements. (Also see Section III.B.1.d. above.)
- Enforcement agencies enter into labor compliance agreements with the contractor; therefore, it is not appropriate to prescribe the content of such agreements in the FAR. Enforcement agencies will determine the agreement contents on a case-by-case basis, taking into consideration the totality of the circumstances.
- The FAR rule implements the E.O. by ensuring that the specific requirements of the E.O. that apply to procurement actions have been implemented in the final rule. These requirements will serve to improve future compliance. For example,

contracting officers will give contractors the opportunity to disclose "mitigating factors and remedial measures such as Offeror actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws" (FAR 52.222–57(d)(1)(iii)). Another example is that ALCAs advise contracting officers at FAR 22.2004–2(b)(3) on whether the contractor's record of labor law compliance warrants a labor compliance agreement. By definition, a labor compliance agreement is designed to increase compliance with labor laws (see FAR 22.2002).

Also, as discussed in its Preamble, through its work with enforcement agencies, DOL will provide assistance in analyzing whether remediation efforts are sufficient to bring contractors into compliance with labor laws and whether implemented programs or processes will improve future compliance.

h. Weight Given to Labor Compliance Agreements in Responsibility Determinations

Comment: A respondent proposed that a contractor's refusal to enter into a labor compliance agreement, or its failure to comply with a labor compliance agreement, be deemed an aggravating factor in a contracting officer's responsibility determination.

Response: Efforts to negotiate and enter into a labor compliance agreement, and adherence to a labor compliance agreement, are addressed in ALCA assessments and are likewise considered in a contracting officer's review of a contractor's record of integrity and business ethics, as part of the responsibility determination. Responsibility determinations are fact specific, and contracting officers, after reviewing and considering the totality of relevant information to the particular procurement, exercise discretion in determining present responsibility (see FAR subpart 9.1). This is a longstanding tenet of procurement practice in the FAR.

i. Concern Regarding Improper Discussions

Comment: A respondent expressed concern that discussions with a contracting officer regarding a labor compliance agreement could constitute improper interaction with offerors and violate the rules in FAR part 15 on holding discussions. The active solicitation and receipt of information and the follow-up discussions regarding the remediation of violations and the terms upon which a contractor will be deemed presently responsible pose significant risks of exceeding the prescribed review of a contractor's record to determine present responsibility for a particular procurement and may also exceed the limited clarification of offers permitted prior to establishment of a competitive range. Only once a competitive range is established can the Government engage in discussions with offerors.

Response: The rule makes it clear at FAR 22.2004–2 that when a contracting officer receives information about an offeror's labor law violations, and the remediation of those violations, this is done to determine "whether a prospective contractor is a responsible source that has a satisfactory record of integrity and business ethics." This is typically done just prior to an award decision, which is after, not during, a contracting officer's evaluation of offers. This does not disturb the competition for a contract. Information needed to make a responsibility determination may be obtained by the contracting officer in accordance with FAR 9.105–1. Discussions under FAR part 15 are distinct from communications with offerors pursuant to responsibility determinations.

The contractor is encouraged to work with DOL on improving the contractor's labor law compliance. This can be before the contractor makes an offer on a solicitation.

j. Process for Enforcement of Labor Compliance Agreements

Comment: A respondent recommended that guidance be provided for penalties to be administered when a labor compliance agreement is violated.

Response: The FAR rule at 22.2004–3(b) provides for the ALCA assessment to address whether the contractor is meeting the terms of a labor compliance agreement. This information is provided to the contracting officer for consideration in making procurement-related decisions, including where the contractor should be referred to the agency suspending and debarring official (see the third example in 22.2004–2(b)(3)(vi)). Procurement agencies are not parties to labor compliance agreements and therefore do not enforce their terms.

k. Pressure or Leverage To Negotiate a Labor Compliance Agreement

Comment: Respondents raised concerns that: The Government will use a labor compliance agreement to improperly expand its remedial authority beyond those statutorily authorized by Congress, contracting officers and ALCAs do not have enforcement authority, and a labor compliance agreement will become an extra-legal mechanism for exacting remedies from contractors that could not otherwise be imposed.

Response: The E.O. does not disrupt or alter existing remedies provided under any of the 14 covered labor laws. Instead, the E.O. and FAR implementation give prospective contractors an additional means, labor compliance agreements, to demonstrate remediation of labor law violations and efforts to prevent future labor law violations. Labor compliance agreements are entered into with enforcement agencies that have jurisdictional authority for the particular labor law(s) violated and so no expansion or extra-legal authority will be undertaken. (See also Section III.B.1. above.)

l. False or Without Merit Allegations/Citations

Comment: Respondents expressed concern that the rule forces contractors into entering into a labor compliance agreement regardless of the merits of the allegations, because the definition of an administrative merits determination presumes all accusations equate to violations. Respondents also raised a concern that third parties could force a contractor into a labor compliance agreement by creating unfounded complaints to undermine the responsibility determination process.

Response: An accusation or claim by a party does not meet the definition of a labor law decision. A labor law decision is not an allegation; instead, only civil judgments, arbitral awards or decisions, and administrative merits determinations are labor law decisions. The terms are discussed in detail in Section II.B. of the DOL Guidance.

m. Interference With Due Process

Comment: Respondents expressed concern that the proposed rule provides virtually no due process protections, stating that every labor law identified in the E.O. has its own enforcement regime. Each provides for varying levels of due process for contractors before they can be forced to pay a fine, or comply with long term injunctive relief.

Response: The final rule, consistent with the proposed rule, does not eliminate any due process protections afforded to parties under the 14 covered labor laws. As explained in discussion of the legal issues in the above section III.B.1. and in the DOL Preamble, Section V., Discussion of general comments, paragraph D.3., neither the E.O., FAR rule, nor the DOL Guidance diminishes existing procedural safeguards already afforded to prospective contractors during the preaward responsibility determination or to contractors after they have been awarded a contract. Moreover, the E.O. does not violate due process because contractors receive notice that the responsibility determination is being made and are offered a predecisional opportunity to be heard by submission of any relevant information—including mitigating factors related to any labor law decision. Nothing in the E.O. diminishes contractors' postdecisional opportunity to be heard through existing administrative processes and the Federal courts. Likewise, the E.O. does not diminish or interfere with due process procedures available with the enforcement agencies that have jurisdictional authority for each of the 14 listed labor laws.

8. Paycheck Transparency

Introductory Summary: Section 5 of the E.O. requires contractors to provide wage statements to individuals working for them, overtime exemption notices to employees exempt from the overtime compensation requirements of the Fair Labor Standards Act (FLSA) for whom the contractor does not want to include hours-worked information on those employees' wage statements, and documentation to individual workers treated as independent contractors notifying them of their status as independent contractors. Section 5 of the E.O. is implemented by FAR 22.2005 and clause 52.222–60 Paycheck Transparency (Executive Order 13673).

The purpose is to increase transparency in compensation information and employment status, which will enhance workers' awareness of their rights, promote greater employer compliance with labor laws, and thereby increase economy and efficiency in Government contracting.

Section 5 of the E.O. requires contractors to provide, on contracts that exceed $500,000, a wage statement document (*e.g.*, a pay stub) in every pay period to all individuals performing work under the contract, for whom contractors are required to maintain wage records under the FLSA, the Wage Rate Requirements (Construction) statute (also known as the Davis-Bacon Act or DBA, see FAR 1.110), or the Service Contract Labor Standards statute (also known as the Service Contract Act or SCA). The content of the wage statement is covered at FAR 52.222–60 and must include the total hours worked in the pay period, the number of those hours that were overtime hours, the rate of pay, the gross pay, and itemized additions made to or deductions taken from gross pay. However, for employees who are exempt from the overtime compensation requirements of the FLSA, contractors do not need to provide information in that employee's wage statement about hours worked, if the contractor has provided written notice of the employee's overtime exemption status.

The E.O. requires that the wage statement also be provided to individuals performing work under the contract for whom contractors are required to maintain wage records under State laws equivalent to the FLSA, DBA, or SCA. Section 2(a)(i)(O) of the E.O. requires DOL to identify those equivalent State laws.

DOL plans to identify these State laws in a second Guidance to be published in the **Federal Register** at a later date (see Section III.B.12 below).

The E.O. also requires contractors to provide a document to all individuals performing work under the contract as independent contractors informing them of that status. The clause at FAR 52.222–60 requires that the document must be provided anew for each Government contract, at the time the independent contractor relationship with the individual is established, or prior to the time the individual begins to perform work on the Government contract.

The E.O. also states the E.O.'s wage statement requirement is "deemed to be fulfilled if the contractor is complying with State or local requirements that the Secretary of Labor has determined are substantially similar to those required by this subsection." The DOL determination of Substantially Similar Wage Payment States may be found at *www.dol.gov/fairpayandsafeworkplaces.* Where a significant portion of the workforce is not fluent in English, the clause requires a contractor to provide its required notices in English and the language with which the significant portion of the workforce is fluent. The clause allows notices to be provided to workers electronically under certain circumstances.

The clause flows down to subcontractors with subcontracts over $500,000, other than subcontracts which are for COTS items.

Department of Labor Guidance—Section VII of the DOL Guidance addresses paycheck transparency. The DOL Guidance assists agencies in interpreting the paycheck transparency provisions of the E.O. and the FAR rule. Like the FAR Council, DOL also received public comments regarding these provisions. DOL analyzed public comments, and made recommendations which the FAR Council is adopting in the final rule version of the clause. The DOL analysis is summarized here. For more detail on the reconciliation of the comments see the DOL Preamble published today accompanying the DOL Guidance.

a. Wage Statement Provision

DOL and the FAR Council received many comments regarding the different aspects of the proposed wage statement requirements. Employee advocates generally supported the Order's wage statement provisions. Employer organizations, on the other hand, commented that the wage statement provisions are overly burdensome and in addition made several specific suggestions and objections.

In order to implement the purposes of the Order's wage-statement requirement, the final FAR rule has interpreted the term "pay" to mean both gross pay and rate of pay. See FAR 52.222–60(b). The final rule has clarified that any additions made to or deductions taken from gross pay must be itemized or identified in the wage statement. See FAR 52.222–60(b). The FAR final rule, therefore, provides that wage statements required under the E.O. must contain the following information: (1) Hours worked, (2) overtime hours, (3) rate of pay, (4) gross pay, and (5) an itemization of each addition to or deduction from gross pay. Nothing prohibits the contractor from including more information in the wage statement (*e.g.*, exempt-status notification, overtime pay rate).

i. Rate of Pay

Comment: Several respondents suggested that contractors should be required to include in the wage statement: (a) The worker's rate of pay, (b) hours and earnings at the basic rate, and (c) hours and earnings at the overtime rate. In their view, these would allow "a worker to fully understand the basis for his or her net pay." They argued that the term "pay" in the E.O. should be defined to include both the worker's regular rate of pay and the total amount of pay for the pay period. "[E]mployers are already required to keep [the rate of pay] information under the FLSA, it is not a burden for them to disclose this information to their workers." Other respondents also noted that several states already require rate of pay information in wage statements, "demonstrating the reasonableness of this requirement." Another respondent suggested that the wage statement should include the "overtime rate of pay and hours calculated," reasoning that the "rate of pay alone is not sufficient for a worker to calculate his or her overtime hours . . . .” Respondents also suggested that the Guidance “should make clear that the terms used in the paycheck transparency provisions have the same meaning as they do under the FLSA.”

Response: The FAR Council and DOL agree with the respondents that the wage statements required under the E.O.'s paycheck transparency provisions should include the rate of pay information. The E.O. states that the wage statement must contain the worker's “pay.” As the respondents noted, the term “pay” can and should be defined to include both “gross pay” and “rate of pay.” DOL indicates that a worker's rate of pay is a crucial piece of information that should appear in the wage statement, because a worker's knowledge of his or her rate of pay enables the worker to more easily determine whether all wages due have been paid. Inclusion of rate of pay in wage statements will reduce the time an employer spends resolving pay disputes because workers will have available the information on which their pay was determined, and be able to identify any problems at an earlier date. Thus, including the rate of pay in the wage statement will help to implement the purposes of the E.O.'s wage statement provision by providing workers with information about how their pay is calculated, enabling workers to raise any concerns about their pay early on, and encouraging employers to proactively resolve such concerns. All parties have an interest in ensuring that workers receive their full pay when it is earned—including contractors who benefit from fair competition, employee satisfaction, and limiting liability for damages resulting from unpaid wages. Also, in most cases, contractors compute gross pay by multiplying the regular hours worked by the worker's rate of pay and, in overtime workweeks, by also multiplying the overtime hours worked by time and one half of the rate of pay. As contractors cannot compute the worker's earnings without the rate of pay information, workers similarly cannot easily determine how their earnings are computed without inclusion of the rate of pay information in the wage statement.

Moreover, the relevant laws already require that the employer keep a record of the rate of pay. As one employee advocacy organization pointed out, the employer must maintain a record of a nonexempt employee's rate of pay under the FLSA. See 29 CFR 516.2(a)(6)(i). A requirement to keep rate of pay information also applies to SCA-covered contracts, see 29 CFR 4.6(g)(1)(ii), and to DBA-covered contracts, see 29 CFR 5.5(a)(3)(i). In general, for DBA and SCA, the basic hourly rate listed in the wage determination is considered the rate of pay that is to be included in the wage statement. Under the FLSA, rate of pay is determined by dividing the employee's total remuneration (except statutory exclusions) by total hours worked in the workweek. See 29 CFR 778.109.

In addition, DOL has identified 15 States that require the worker's rate of pay to be included in wage statements. Contractors located in one of these 15 States should already be compliant with the requirement to include the rate of pay in the wage statement. Therefore, including this information in the wage statement helps the worker to understand the gross pay received and how it was calculated, in order to realize the purposes of the E.O. with limited burden to contractors.

DOL indicates that it is not essential for the overtime rate of pay to be included in the wage statement. For example, in order to check the accuracy of the wages paid in weeks when overtime hours are worked, a worker can generally perform the necessary calculations. The inclusion of the overtime rate of pay in the wage statement would slightly simplify the calculation for the worker. In most situations, once the worker knows his or her rate of pay, the worker can readily determine what the overtime pay rate should be by simply multiplying the rate of pay by time and one half (by a factor of 1.5).

In addition, the FLSA, SCA, and DBA regulations do not require contractors to keep a record of the overtime pay rate in their payroll records. Similarly, with some exceptions, State laws generally do not require that the overtime rate of pay be included in wage statements. Therefore, requiring the overtime rate of pay in the wage statement would be a new burden on contractors and, as already discussed, having the overtime pay-rate information in the wage statement does not significantly improve the worker's ability to determine whether the correct wages were paid.

With regard to the comment that the Guidance should make clear that the terms used in the E.O.'s paycheck transparency provision should be given the same meaning as in the FLSA, DOL agrees with this comment to the extent the FLSA provides relevant meaning and context to the terms in the E.O.'s paycheck transparency provisions. DOL has cited to the FLSA regulations where applicable.

ii. Itemizing Additions Made to and Deductions Taken From Wages

Comment: Employee advocates urged DOL to require contractors to itemize additions made to and deductions taken from wages in the wage statement.

Response: The Councils and DOL agree with respondents that the additions made to and deductions taken from gross pay should be itemized in the wage statement. Section 5(a) of the E.O. provides that the wage statement should, among other items, include “any additions made to or deductions made from pay.” The E.O., therefore, already contemplates that any and all additions or deductions be separately noted in the wage statement; in other words, the wage statement must itemize or identify each addition or deduction, and not merely provide a lump sum for the total additions and deductions. Accordingly, the FAR final rule and the final Guidance clarify that additions and deductions must be itemized.

Neither DOL nor the Councils received comments specifically objecting to the itemization of additions or deductions.

With regard to suggestions by employee advocates that the wage statements should identify the name and address of each fringe benefit fund, and the plan sponsor and administrator of each fringe benefit plan, DOL believes, and the Councils agree, that listing such information in the wage statement would be duplicative.

Comment: One respondent requested that the hourly fringe-benefit rate be listed in the wage statement.

Response: DOL concludes, and the Councils agree, that it is not essential to include the hourly fringe-benefit rate in the wage statement.

The amount of the fringe benefit required by the DBA or SCA is typically expressed as an hourly rate in the wage determinations issued by DOL. The contractor may pay this amount as a contribution to a fringe benefit fund or plan, or in “cash” as an addition to the worker's wages. Section 5(a) of the E.O. requires any additions made to gross pay be listed in the wage statement. DOL stated that fringe-benefit amounts paid by the contractor into a fund or plan (*e.g.*, health insurance or retirement plan) on behalf of the worker should not be considered additions to the worker's gross pay for purposes of the Order. Such fringe-benefit contributions are excludable from the regular rate for purposes of computing overtime pay under the FLSA and are not taxable. Fringe-benefit contributions paid by the contractor on behalf of the worker thus do not need to be included in the wage statement, as such information has no bearing on determining whether the worker received the correct cash wages as reported in the wage statement.

The wage determination issued under the DBA and SCA that is applicable to the contract must be posted by the contractor at the site of work in a prominent and accessible place where it can be easily seen by the workers. See 29 CFR 5.5(a)(1)(i), 4.6(e). Workers therefore have access to fringe benefit rate information, further negating the necessity to include the fringe benefit rate amount in the wage statement.

On the other hand, when the contractor elects to meet its fringe benefit obligation under the DBA or SCA by paying all or part of the stated hourly amount in "cash" to the worker, the payments are subject to tax withholdings, and the wage statement should list the fringe benefit amounts paid as an addition to the worker's pay. Such amounts are part of gross pay.

iii. Weekly Accounting of Overtime Hours Worked

Comment: Industry respondents objected to the proposed requirement that if the wage statement is not provided weekly and is instead provided bi-weekly or semi-monthly (because the pay period is bi-weekly or semi-monthly), then the hours worked and overtime hours contained in the wage statement must be broken down to correspond to the period for which overtime is actually calculated and paid (which will almost always be weekly). See 80 FR 30571 (FAR proposed rule); 80 FR 30591 (DOL proposed Guidance). Several employer representatives stated that contractors generally issue wage statements on a bi-weekly basis, and do not separately provide the number of hours worked (regular and overtime hours) for the first and second workweeks of the bi-weekly pay period. These respondents stated that requiring a weekly accounting of regular hours worked (*i.e.*, hours worked up to 40 hours) and overtime hours worked in the wage statement would be costly to implement and unnecessary.

Response: As DOL discussed in the proposed Guidance, transparency in the relationships between employers and their workers is critical to workers' understanding of their legal rights and to the speedy resolution of workplace disputes. See 80 FR 30591. The calculation of overtime pay on a workweek-by-workweek basis as required by the FLSA has been a bedrock principle of labor protections since 1938. See 29 U.S.C. 207(a). A wage statement that is provided bi-weekly or semi-monthly that does not separately state the hours worked during the first workweek from those worked during the second workweek of the pay period fails to provide workers with sufficient information about their pay to be able to determine if they are being paid correctly. For example, a worker who receives a wage statement showing 80 hours worked during a bi-weekly pay period and all hours paid at the regular (straight-time) rate may, in fact, have worked 43 hours the first week and 37 hours the second week. In this case, to comply with the FLSA, the employer should have paid the worker at time and one half of the worker's regular rate of pay for the three hours worked after 40 hours in the first workweek. Without documentation of the weekly hours, it would be difficult for this worker to determine whether overtime pay is due.

The FLSA already requires that employers calculate overtime pay after 40 hours worked per week; and the implementing regulations under the FLSA, DBA, and SCA require employers to maintain payroll records for at least three years. Under the FLSA regulations at 29 CFR 516.2(a)(7), for instance, the employer must maintain a record of each nonexempt employee's total hours worked per week. A requirement to keep rate of pay information also applies to SCA-covered contracts, see 29 CFR 4.6(g)(1)(iii), and to DBA-covered contracts, see 29 CFR 5.5(a)(3)(i). Moreover, workers covered under DBA must be paid on a weekly basis requiring a workweek-by-workweek accounting of overtime hours worked. See 29 CFR 5.5(a)(1)(i). Therefore, as noted in this DOL analysis, including hours worked information in the wage statement derived on a workweek basis will not be overly burdensome, and the FAR Council final rule retains this requirement.

iv. Substantially Similar State Laws

The E.O. provides that the wage-statement requirements "shall be deemed to be fulfilled" where a contractor "is complying with State or local requirements that the Secretary of Labor has determined are substantially similar to those required" by the E.O. See E.O. Section 5(a). If a contractor provides a worker in one of these "substantially similar" States with a wage statement that complies with the requirements of that State, the contractor would satisfy the E.O.'s wage-statement requirements. In the proposed Guidance, the DOL stated that two requirements do not have to be exactly the same to be "substantially similar"; they must, however, share "essential elements in common." 80 FR 30587 (quoting *Alameda Mall, L.P.* v. *Shoe Show, Inc.*, 649 F.3d 389, 392 (5th Cir. 2011)). The proposed Guidance offered two options for determining whether State requirements are substantially similar to the E.O.'s requirements.

The first proposed option identified as substantially similar those States that require wage statements to have the essential elements of overtime hours or earnings, total hours, gross pay, and any additions made to or deductions taken from gross pay. As the proposed Guidance noted, when overtime hours or earnings are disclosed in a wage statement, workers can identify from the face of the document whether they have been paid for overtime hours.

The second proposed option would have allowed wage statements to omit overtime hours or earnings, as long as the wage statements included "rate of pay," in addition to the essential elements of total hours, gross pay, and any additions made to or deductions taken from gross pay. The intent of this option was to allow greater flexibility while still requiring wage statements to provide enough information for a worker to calculate whether he or she has been paid in full. DOL noted that one drawback of this option was that failure to pay overtime would not be as easily detected when compared with the first option. The worker would have to complete a more difficult calculation to identify an error in pay.

DOL requested comments regarding the two options and stated that it could also consider other combinations of essential elements or other ways to determine whether State or local requirements are substantially similar. See 80 FR 30592.

Comment: Numerous employee advocates and members of Congress strongly supported the first option. These respondents observed that employers and workers benefit when workers can easily understand their pay by reviewing their wage statement. They noted that wage statements also provide an objective record of compensated hours, which helps employers to more easily meet their burden of demonstrating wages paid for hours worked. A comment by members of Congress favored the first option because "[d]isclosing whether workers have been paid at the overtime rate is critical to enabling workers to discern whether they have been paid fairly." Other respondents further recommended that the first option be adopted with the modification that the rate of pay information should also be included as an essential element.

The employee advocates found the second option (which would have allowed wage statements to omit overtime hours or earnings, as long as the wage statements include the rate of pay) to lack transparency. On the other hand, employer representatives recommended that the second option be adopted. They explained that the second option would result in more substantially similar states and localities than would the first option—thereby reducing compliance burdens and providing greater flexibility to contractors. They also stated the second option is more in line with employers' practices and is less burdensome than the first option.

Response: DOL analyzed the public comments in the Preamble to its final Guidance, and adopted the first option for determining whether wage statement requirements under State law are substantially similar. The list of Substantially Similar Wage Payment States, now adopted in the final Guidance is: (1) Alaska, (2) California, (3) Connecticut, (4) the District of Columbia, (5) Hawaii, (6) New York, and (7) Oregon. These States and the District of Columbia require wage statements to include the essential elements of hours worked, overtime hours, gross pay, and any itemized additions made to and deductions taken from gross pay.

Comment: A respondent requested clarification regarding whether complying with a State requirement (*e.g.*, the California State requirement) means that the contractor has met the E.O.'s requirement for all employees or just employees in that State.

Response: DOL notes that as long as the contractor complies with the wage-statement requirements of any of the Substantially Similar Wage Payment States, the contractor will be in compliance with the final rule. For example, if a contractor has workers in California and Nevada, the contractor may provide workers in both States with wage statements that adhere to California State law to comply with the FAR Council final rule. (California is among the States included in the list of Substantially Similar Wage Payment States, while Nevada requires minimal information in the wage statement provided to workers.) Thus, the contractor would be in compliance with the final rule if it adopts the wage-statement requirements of any particular State or locality in the list of Substantially Similar Wage Payment States in which the contractor has workers, and applies this model for its workers elsewhere.

v. Request To Delay Effective Date

Comment: One employer advocate suggested that DOL and the FAR Council allow Federal contractors time to comply with the wage-statement provisions. The respondent noted that, in the short term, contractors will have to devise manual wage statements to comply with the E.O. until automated systems are able to generate compliant wage statements. Citing DOL's Home Care rule regarding the application of the FLSA to domestic service (78 FR 60454, Oct. 1, 2013), which had an effective date 15 months after the publication of the final rule, the respondent recommended that contractors be provided at least 12 to 15 months within which to comply with the wage-statement requirements.

Response: The Councils have revised the proposed rule to implement a phased implementation for paycheck transparency provisions, in order to permit time for prime contractors and subcontractors to determine and effect changes necessary to their payroll systems to comply with the rule. Beginning January 1, 2017, the 52.222–60 clause will be inserted in solicitations if the estimate value exceeds $500,000, and in resultant contracts. See FAR 22.2007(d).

b. Fair Labor Standards Act (FLSA) Exempt-Status Notification

According to the E.O., the wage statement provided to workers who are exempt from the overtime pay provisions of the FLSA "need not include a record of hours worked if the contractor informs the individuals of their exempt status." See E.O. Section 5(a). Because such workers do not have to be paid overtime under the FLSA, hours worked information need not be included in the wage statement. See 80 FR 30592. DOL suggested in its proposed Guidance that in order to exclude the hours-worked information in the wage statement, the contractor would have to provide a written notice to the worker stating that the worker is exempt from the FLSA's overtime pay requirements; oral notice would not be sufficient. *Id.* The proposed FAR rule noted that if the contractor regularly provides documents to workers electronically, the document informing the worker of his or her exempt status may also be provided electronically if the worker can access it through a computer, device, system, or network provided or made available by the contractor. See 80 FR 30561. The proposals suggested that if a significant portion of the contractor's workforce is not fluent in English, the document provided notifying the worker of exempt status must also be in the language(s) other than English in which the significant portion of the workforce is fluent. See 80 FR 30592.

The FAR Council and DOL received comments regarding the following issues related to the FLSA exempt-status notice: Type and frequency of the notice, differing interpretations by the courts regarding exemptions under the FLSA, and phased-in implementation.

i. Type and Frequency of the Notice

Comment: One labor union commented that the contractor should be excused from recording the overtime hours worked in the wage statement only if the worker is correctly classified as exempt from the FLSA's overtime pay requirements. The respondent also recommended that workers should be informed of their exempt status on each wage statement. An employer-advocate requested clarification on whether the exempt-status notice should be provided once (*e.g.*, in a written offer of employment) or on a recurring basis (*e.g.*, on each wage statement).

Response: With regard to the labor union's comment on the importance of correctly determining the exempt status of a worker under the FLSA, the FAR Council and DOL agree that employers should correctly classify their workers. An employer who claims an exemption from the FLSA is responsible for ensuring that the exemption applies. See *Donovan* v. *Nekton, Inc.*, 703 F.2d 1148, 1151 (9th Cir. 1983). However, the fact that an employer provides the exempt-status notice to a worker does not mean that the worker is necessarily classified correctly. DOL will not consider the notice provided by the contractor to the worker as determinative of or even relevant to whether the worker is exempt or not under the FLSA. Accordingly the FAR Council has provided in the final rule that a contractor may not in its exempt-status notice to a worker indicate or suggest that DOL or the courts agree with the contractor's determination that the worker is exempt.

With regard to the type of notice to be provided to the worker and how often it should be provided, after carefully reviewing the comments, DOL believes, and the FAR Council agrees, that it is sufficient to provide notice to workers one time before the worker performs any work under a covered contract, or in the worker's first wage statement under the contract. If during performance of the contract, the contractor determines that the worker's status has changed from nonexempt to exempt, it must provide notice to the worker prior to providing a wage statement to the worker without hours worked information or in the first wage statement after the change. The notice must be in writing; oral notice is not sufficient. The notice can be a stand-alone document or be included in the offer letter, employment contract, position description, or wage statement provided to the worker. See FAR 52.222–60(b).

DOL does not believe that it is necessary, and the FAR Council agrees that it is not necessary, to require a contractor to include the exempt-status information on each wage statement. While it is permissible to provide notice on each wage statement, it also is permissible to provide the notice one time before any work on the covered contract is performed. If the contractor does the latter, there is no need to provide notice in the first wage statement.

ii. Differing Interpretations by the Courts of an Exemption Under the FLSA

Comment: One respondent stated that it would not be prudent to require employers to report on the exempt or nonexempt status of workers where there is disagreement among the courts on who is and who is not exempt under the FLSA.

Response: Some court decisions regarding the exemption status of certain workers under the FLSA may not be fully consistent. However, this is not a persuasive reason to relieve contractors from providing the exempt-status notice to employees. Regardless of any inconsistency in court decisions, contractors already must make decisions about whether to classify their employees as exempt or nonexempt under the FLSA in order to determine whether to pay them overtime. Such determinations are based on the facts of each particular situation, the statute, relevant regulations, guidance from DOL, and advice from counsel. In addition, in making these determinations, contractors already must consider any inconsistent court decisions.

The E.O. does not change this status quo. Under the E.O., the contractor retains the authority and responsibility to determine whether to claim an exemption under the FLSA. All that is required under the E.O. is notice to the workers of the status that the employer has already determined. Such notice is only required if the employer wishes to provide workers with a wage statement that does not contain the worker's hours worked.

iii. Request To Delay Implementation of the Exempt-Status Notice

Comment: One industry association suggested that implementation of the exempt-status notice be postponed until DOL has finalized its proposal to update the regulations defining the "white collar" exemptions under section 13(a)(1) of the FLSA. See 80 FR 38515 (July 6, 2015); *http://www.dol.gov/whd/overtime/NPRM2015/.* The white-collar exemptions define the executive, administrative, and professional employees who are exempt from the FLSA's minimum wage and overtime pay protections. See 29 CFR part 541.

Response: DOL has finalized its rulemaking to update the FLSA's white-collar exemptions. (See 81 FR 32391, May 23, 2016.) In any event, the FAR Council's concurrence to phased implementation for the wage statement requirement will result in delayed implementation of the paycheck transparency clause at FAR 52.222–60.

c. Independent Contractor Notice

Section 5(b) of the E.O. states that if a contractor treats an individual performing work under a covered contract as an independent contractor, then the contractor must provide "a document informing the individual of this [independent contractor] status." Contracting agencies must require that contractors incorporate this same requirement into covered subcontracts. See FAR 52.222–60(d) and (f).

The proposed FAR rule provided that the notice informing the individual of the independent contractor status must be provided before any work is performed under the contract. See 80 FR 30572. As DOL noted in the proposed Guidance, the notice must be in writing and provided separately from any agreement entered into between the contractor and the independent contractor. See 80 FR 30593.

The proposed Guidance further stated that the provision of the notice to a worker informing the worker that he or she is an independent contractor does not mean that the worker is correctly classified as an independent contractor under the applicable laws. See 80 FR 30593. The determination of whether a worker is an independent contractor under a particular law remains governed by that law's definition of "employee" and its standards for determining for its purposes which workers are independent contractors and not employees. *Id.*

DOL received comments from several unions and other employee advocates that were supportive of the E.O.'s independent contractor notice provisions. In contrast, several industry advocates commented that several aspects of the independent contractor notice requirement need to be clarified.

i. Clarifying the Information in the Notice

Comment: DOL received comments requesting clarification of the information that should be included in the independent contractor notice. Several employee advocates recommended that the document also notify the worker that, as an independent contractor, he or she is not entitled to overtime pay under the FLSA, is not covered by worker's compensation or unemployment insurance, and is responsible for the payment of relevant employment taxes.

One employee advocate recommended that the notice include a statement notifying the worker that the contractor's designation of a worker as an independent contractor does not mean that the worker is correctly classified as an independent contractor under the applicable law. Several respondents suggested that the notice also include information regarding which agency to contact if the worker has questions about being designated as an independent contractor or needs other types of assistance. One labor union also recommended that DOL establish a toll-free hotline that provides more information on misclassification of employees as independent contractors or tools to challenge the independent contractor classification.

One industry respondent suggested that the FAR Council or DOL publish a model independent contractor notice with recommended language. Another industry respondent requested more detailed guidance on what the independent contractor notice should include.

Response: Section 5(b) of the E.O. requires that the worker be informed in writing by the contractor if the worker is classified as an independent contractor and not an employee. Thus, the final FAR rule clarifies that the notice must be in writing and provided separately from any independent contractor agreement entered into between the contractor and the individual. See FAR 52.222–60(d)(1).

The E.O., however, does not require the provision of the additional information suggested by respondents. DOL believes, and the FAR Council agrees, that notifying the worker of his or her status as an independent contractor satisfies the Order's requirement. Providing such notice enables workers to evaluate their status as independent contractors and raise any concerns. The objective is to minimize disruptions to contract performance and resolve pay issues early and efficiently. If the worker has questions or concerns regarding the particular determination, then he or she can raise such questions with the contractor and/or contact the appropriate Government agency for more information or assistance.

With regard to comments about contractors correctly classifying individuals as independent contractors, similar to the prior discussion regarding the FLSA exempt-status notification, providing the notice does not mean that the worker is correctly classified as an independent contractor. DOL will not consider the notice when determining whether a worker is an independent contractor or employee under the laws that it enforces. Accordingly, a contractor may not in its notice indicate or suggest that enforcement agencies or the courts agree with the contractor's determination that the worker is an independent contractor.

With regard to comments recommending that DOL establish a hotline that provides information on issues involving misclassification of employees as independent contractors, the relevant agencies within DOL already have toll-free helplines that workers and contractors can access to obtain this type of information and for general assistance. Members of the public, for example, can call the Wage and Hour Division's toll-free helpline at 1–866–4US–WAGE (487–9243), the Occupational Safety and Health Administration at 1–800–321–OSHA (6742), and the Office of Federal Contract Compliance Programs at 1–800–397–6251. The National Labor Relations Board can be reached at 1–866–667–NLRB (667–6572), and the Equal Employment Opportunity Commission at 1–800–669–4000. Moreover, the enforcement agencies' respective Web sites contain helpful information regarding employee misclassification.

With regard to comments requesting a sample independent contractor notice, DOL does not believe that it is necessary to create a template notice. DOL expects that any notice would explicitly inform the worker that the contractor had made a decision to classify the worker as an independent contractor.

ii. Independent Contractor Determination

Comment: Several industry members suggested that DOL clarify which statute should provide the basis for determining independent-contractor status for purposes of the E.O.'s requirement. These respondents noted that the proposed Guidance stated that the determination of whether a worker is an independent contractor or employee under a particular law remains governed by that law's definition of "employee." 80 FR 30593. The respondents stated that they are uncertain as to what definition should be used in determining whether a worker is an employee or independent contractor.

Response: DOL and the FAR Council do not find it necessary or appropriate to pick one specific definition of "employee" for the E.O.'s independent-contractor notice requirement. Employers already make a determination of whether a worker is an employee (or an independent contractor) whenever they hire a worker. The E.O. does not affect this responsibility; it only requires the contractor to provide the worker with notice of the determination that the contractor has made. If the contractor has determined that the worker is an independent contractor, then the employer must provide the notice.

iii. Frequency of the Independent Contractor Notice

Comment: The FAR Council and DOL received comments regarding the number of times an individual who is classified as an independent contractor and engaged to perform work on several covered contracts should receive notice of his or her independent contractor status. Two industry respondents, for example, noted that an independent contractor who provides services on multiple covered contracts on an intermittent basis could receive dozens of identical notices, resulting in redundancy and inefficiencies. Other industry respondents believed that providing multiple notices for the same work performed on different covered contracts is burdensome and unnecessary. Two industry respondents suggested that an independent contractor agreement between the relevant parties should satisfy the E.O.'s independent contractor notice requirement.

Response: The final FAR rule provides that the notice informing the individual of his or her independent contractor status must be provided at the time an individual is engaged as an independent contractor or before the individual performs any work under the contract. See FAR 52.222–60(d)(1). The final FAR rule also clarifies that contractors must provide the independent-contractor notice to the worker for each covered contract on which the individual is engaged to perform work as an independent contractor. See FAR 52.222–60(d). The Guidance reflects this clarification. DOL agrees that there may be circumstances where a worker who performs work on more than one covered contract would receive more than one independent contractor notice. DOL, however, believes that because the determination of independent contractor status is based on the circumstances of each particular case, it is reasonable to require that the notice be provided on a contract-by-contract basis even where the worker is engaged to perform the same type of work. It is certainly possible that the facts may change on any of the covered contracts such that the work performed requires a different status determination.

iv. Workers Employed by Staffing Agencies

Comment: The FAR Council and DOL received several comments regarding contractors that use temporary workers employed by staffing agencies and whether those contractors must provide such workers with a document notifying them that they are independent contractors. One respondent believed that in such cases, "temporary workers are neither independent contractors nor employees of the contractor." Several industry respondents suggested that the final Guidance clarify that contractors would not be required to provide notice of independent contractor status to temporary workers who are employees of a staffing agency or similar entity, but not of the contractor. Some of these respondents also recommended that the independent contractor status notice be given only to those workers to whom the contractor provides an IRS Form 1099.

Response: In situations where contractors use temporary workers employed by staffing agencies to perform work on Federal contracts, the contract with the staffing agency may be a covered subcontract under the E.O. Section 5 of the E.O. requires that the independent contractor status notice requirement be incorporated into subcontracts of $500,000 or more. See E.O. Section 5(a). If the contract with the staffing agency is a covered subcontract, and the staffing agency treats the workers as employees, then no notices would be required. If the contract with the staffing agency is a covered subcontract, and the staffing agency treats the workers as independent contractors, then the staffing agency (not the contractor) is required to provide the workers with notice of their independent contractor status. (When using a staffing agency, a contractor should consider whether it jointly employs the workers under applicable labor laws. DOL recently issued Guidance under the FLSA and Migrant and Seasonal Agricultural Worker Protection Act for determining joint employment.)

The FAR Council and DOL disagree with comments suggesting that the contractor should provide independent-contractor notices only to those workers to whom the contractor already provides an IRS Form 1099. Employers use a Form 1099–MISC to report, among other items, "payments made in the course of a trade or business to a person who is not an employee or to an unincorporated business." The E.O. does not limit the requirement to provide the independent contractor notice to workers who receive a Form 1099–MISC. To the extent the contractor has classified an individual as an independent contractor for Federal employment tax purposes and provides the individual a Form 1099–MISC, the contractor must provide the individual with the independent-contractor status notice. The universe of workers who should receive an independent contractor notice should not be limited only to those workers to whom the contractor already provides a Form 1099.

d. Requirements That Apply to All Three Documents (Wage Statement, FLSA Exempt-Status Notice, Independent Contractor Notice)

The FAR Council's proposed regulations would have required that if a significant portion of the contractor's workforce is not fluent in English, the document notifying a worker of the contractor's determination that the worker is an independent contractor, and the wage statements to be provided to the worker, must also be in the language(s) other than English in which the significant portion of the workforce is fluent. The proposed regulations were unclear with regard to whether required documents could be provided electronically. See 80 FR 30572. The final rule has been revised at FAR 52.222–60(e) to clarify that all documents required must be provided in English and the language(s) in which significant portions of the workforce is fluent, and that all documents may be provided electronically under certain circumstances.

i. Translation Requirements

Comment: The FAR Council and DOL received comments requesting clarification regarding what would constitute a "significant portion" of the workforce sufficient to trigger the translation requirement. One industry respondent stated that the final Guidance should set a specific threshold. Another stated that the translation requirement is unnecessary and should be removed. One labor union recommended that the term "significant portion" of the workforce be defined as 10 percent or more of the workforce under the covered contract.

One industry respondent posited a situation where there are various foreign languages spoken in the workplace, and requested clarification regarding whether the contractor would be required to provide the wage statement and the independent contractor notice to workers in every language that is spoken by workers not fluent in English. The respondent suggested that the wage statement translation requirement be revised to state: "Where a significant portion of the workforce is not fluent in English but is fluent in another language, the contractor shall provide the wage statement in English and in each other language in which a significant portion of the workforce is fluent."

With regard to translating the independent contractor notice, the respondent recommended that this requirement apply only when the company is aware that the worker is not fluent in English. Another industry respondent also stated that it would not be sensible to require contractors to provide notice in Spanish to an independent contractor who speaks only English simply because a significant portion of the contractor's workforce is fluent in Spanish. A respondent further advocated that contractors should be allowed to include in each wage statement and independent contractor notice a Web site address where the translations are posted, instead of including the complete translation in each wage statement or independent contractor notice for each worker.

Response: For reasons noted by DOL, the FAR Council does not believe that it is necessary to set a specific threshold defining what would constitute a "significant portion" of the workforce sufficient to trigger the final FAR rule's translation requirement. As DOL notes, this requirement is similar to regulatory requirements implementing two of the labor laws, the Family and Medical Leave Act and the Migrant and Seasonal Agricultural Worker Protection Act. The term "significant portion" has not been defined under these regulations, and the lack of a definition or bright-line test has not prevented employers from complying with the requirement. For these reasons, the term is not defined in the final Guidance.

The FAR Council and DOL agree with the suggestion about workplaces where multiple languages are spoken. Where a significant portion of the workforce is not fluent in English, DOL finds that the contractor should provide notices to workers in each language in which the significant portion of the workforce is fluent. However, the FAR Council and DOL do not agree with the suggestion that it would be sufficient in all cases to provide a Web site address where the translated notice would be posted. Where workers are not fluent in English, providing a link to a Web site for the translation would be ineffective at providing the required notice.

ii. Electronic Wage Statements

Comment: With regard to providing wage statements electronically, one respondent agreed that providing wage statements electronically should be an option. One labor union advocated that workers should be allowed to access wage statements using the contractor's computer network during work hours. According to the union, merely providing workers with the Web site address to access their wage statements on their own would be insufficient as such an arrangement would require the worker to purchase internet connection to access the information. Another respondent suggested that the contractor should be allowed to provide wage statements electronically only with written permission from the worker and if written instructions on how to access the wage statements are provided to the worker.

Response: The FAR Council finds, and DOL agrees, that contractors should have the option of providing wage statements either by paper-format (*e.g.,* paystubs), or electronically if the contractor regularly provides documents electronically and if the worker can access the document through a computer, device, system, or network provided or made available by the contractor. (The final FAR rule states that the FLSA exempt-status notice and the independent contractor notice also may be provided electronically on these terms.) As DOL stated in the Preamble to its final Guidance, merely providing workers with a Web site address would be insufficient; the contractor must provide the worker with internet or intranet access for purposes of viewing this information. The FAR Council and DOL, however, find that it is not necessary to require contractors to allow workers such access during work hours. The FAR Council and DOL assume that workers will, in most cases, access wage statements (or other employer-provided documents, such as leave statements or tax forms) using the contractor's network or system during the workday—including during the worker's rest breaks or meal periods. It is not necessary to specifically prescribe a requirement regarding the time period during which a wage statement can be accessed. We also find that it is not necessary to require that workers give consent before receiving the wage statement electronically, or to require that workers be given written instructions on how to access the wage statement using the contractor's computer, device, system, or network. As the DOL proposed Guidance noted, the employer must already be regularly providing documents to workers electronically in order to provide wage statements in the same manner. See 80 FR 30592. Contractors that already provide documents electronically presumably also provide general instructions regarding accessing personnel records on their intranet Web pages; therefore, additional written instructions specific to accessing the worker's wage statement using the contractor's computer, device, network, or system are not necessary. Similarly, requiring a written consent by the worker is not necessary, because the workers for such employers should already be familiar with the process for receiving documents electronically.

9. Arbitration of Contractor Employee Claims

Introductory Summary: The FAR Council received various comments concerning the clause FAR 52.222–61, Arbitration of Contractor Employee Claims (Executive Order 13673), which is required by Section 6 of the E.O. The clause provides that contractors agree that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964, or any tort related to or arising out of sexual assault or harassment, shall only be made with the voluntary consent of employees or independent contractors after such disputes arise, subject to certain exceptions. The clause applies to contracts and subcontracts if the estimated value exceeds $1,000,000, other than those for commercial items.

Comment: Several respondents commented that the proposed rule is invalid and unenforceable because it conflicts with Federal statute, U.S. Supreme Court precedent, current regulation, or should otherwise only be accomplished through Congressional legislation. Respondents provided the following in support of their comments: *Gilmer* v. *Interstate/Johnson Lane Corp.,* 500 U.S. 20, 25 (1991) (the FAA reflects a "liberal federal policy favoring arbitration agreements." *AT&T Mobility LLC* v. *Concepcion,* 563 U.S. 333, 339 (2011) ("The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements.") U.S. Supreme Court's decision in *CompuCredit* v. *Greenwood,* 565 U.S. 95 (2012), and similar rulings upholding the enforceability of arbitration agreements pursuant to the Federal Arbitration Act.

Response: As explained above in Section III.B.1.d., the final rule does not conflict with the Federal Arbitration Act or regulations or judicial decisions interpreting that Act.

Comment: Several respondents commented that the proposed rule offered no explanation, or an inadequate explanation, for how a limitation on arbitration agreements would promote economy and efficiency in Federal procurement. Some of these respondents expressed the view that the proposed rule would in fact work against the stated aims of the E.O. One respondent also stated that the limitation had no connection with the Federal procurement process and should be deleted in its entirety.

Response: As explained above in Section III.B.1.d, the limitation on arbitration agreements is a reasonable and rational exercise of the President's authority, under the Procurement Act, to prescribe policies and directives that the President considers necessary to carry out the statutory purposes of ensuring economical and efficient government procurement.

Comment: Respondents commented that the exception for arbitrations conducted pursuant to collective bargaining agreements improperly penalized contractors without collective bargaining agreements and recommended the exception be removed.

Response: As explained above in Section III.B.1.d, the exception does not penalize contractors without collective bargaining agreements and will remain in the final rule.

Comment: Respondents recommended that contractors who retain forced arbitration provisions for employment disputes other than those specifically prohibited by the regulation should be barred from enforcing those remaining forced arbitration provisions in the event disputes arise out of the same set of facts.

Response: As explained above in Section III.B.1.d., to be consistent with DoD's existing regulations and the requirements of the Executive Order, this rule does not apply the limitation on mandatory pre-dispute arbitration to aspects of an agreement unrelated to the covered areas.

Comment: Several respondents expressed support of the limitations on arbitration agreements as a worthwhile protection for employees. Some respondents commented that the authority for this E.O. is sound. One respondent expressed that society benefits from an open legal process, which exposes civil rights violations and perpetrators of sexual assault instead of hiding them from view. Forced arbitration, on the other hand, restricts the public's ability to obtain such information and keeps abusive practices hidden. One respondent found that there is a distinct link between the E.O. and economy and efficiency. Limiting forced arbitration is a fundamental component of decreasing systemic discrimination by Government contractors because forced arbitration allows employers to avoid accountability for violating Federal anti-discrimination laws. Respondents asserted that, with less discrimination in Government contracting, efficiency will increase. The Federal Arbitration Act (FAA), as originally drafted and passed in 1925, neither envisioned, nor intended forcing individual employees into secret, private arbitration forums thereby depriving them of their constitutional right to trial by jury. Nor was it intended to apply in scenarios where individuals with little to no bargaining power must sign away their rights as a condition of securing employment. Rather, the FAA was intended to apply only in cases involving commercial disputes between two businesses with relatively equal bargaining power. Respondents provided the following in support of their comments: Margaret L. Moses, *Arbitration Law: Who's in Charge?,* 40 Seton Hall L. Rev. 147, 147 (2010) ("The Federal Arbitration Act (FAA) that Congress adopted in 1925 bears little resemblance to the Act as the Supreme Court of the United States has construed it. The original Act was intended to provide Federal courts with procedural law that would permit the enforcement of arbitration agreements between merchants in diversity cases."). Maureen A. Weston, *Preserving the Federal Arbitration Act by Reining in Judicial Expansion and Mandatory Use,* Nev. L.J. 385,392 (2007) (FAA "was intended to apply to disputes between commercial entities of generally similar bargaining power."). Judith Resnick, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights,* Yale

Law Journal, Vol. 124, p. 2808–2943 (2015), available at *http://ssrn.com/abstract=2601132*.

Response: As explained above in Section III.B.1.d, the FAR Council agrees that the limitation on arbitration agreements does not conflict with the Federal Arbitration Act, and is a reasonable and rational exercise of the President's authority, under the Procurement Act, to prescribe policies and directives that the President considers necessary to carry out the statutory purposes of ensuring economical and efficient government procurement.

Comment: Respondents commented that the proposed rule was unworkably vague because it failed to clarify whether the prohibition on certain arbitration agreements applies solely to employees working under a covered contract, or applies to all employees of the firm generally, regardless of whether they were working under the contract. Several respondents recommended the final rule specify that the limitations on arbitration agreements apply to all employees, or all unrepresented employees, not just those working on the Federal contract.

Response: The clause requires the contractor to agree not to enter into the specified arbitration agreements. The clause does not provide an exception for employees not working under the contract. Thus, the clause applies to all contractor employees and independent contractors.

Comment: A respondent recommended clarification of the exceptions to the limitation on arbitration and particularly recommended definitions for "permitted," "renegotiated," and "replaced" as clarifications.

Response: The Councils decline to revise the clause because it is implementing the language of Section 6.c.ii. of the E.O. There are three terms that the respondent requested be clarified, which appear in paragraph (b)(2) of the Arbitration of Contractor Employee Claims (Executive Order 13673) clause at FAR 52.222–61. The word "permitted" means that the contractor is able to modify the employment contract. The words "renegotiated" or "replaced" refer to a modified or new employment contract.

Comment: Respondents recommended revising the proposed rule to require contractors to report on use of forced arbitration not prohibited by the regulation.

Response: The Councils decline to add a reporting requirement as the E.O. did not contain a reporting requirement, and adding a reporting requirement would increase the burden on contractors.

Comment: One respondent stated that there is no process for third parties to report contractor violations of the arbitration provisions of the E.O.

Response: Existing procurement practices allow for other sources, including third parties, to inform the contracting officer that the contractor is not meeting the terms of its contract, which would include clause violations.

Comment: Respondents recommended that the final rule expand the arbitration limitations to cover claims arising out of discrimination against the disabled. Likewise, other respondents suggested expansion to cover claims under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, or its implementing regulations at 41 CFR part 60–300, under the Uniformed Services Employment and Reemployment Rights Act of 1994. Others suggested expansion to the full list of 14 labor laws and E.O.s covered under Section 2 of the E.O.

Response: In accordance with the E.O., the clause applies to Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex and national origin, and to any tort related to or arising out of sexual assault or harassment. The Councils decline to extend the clause coverage.

Comment: A respondent recommended the dollar threshold that triggers the predispute arbitration agreement requirement be lowered to $500,000.

Response: The E.O. clearly states the prohibition on arbitration applies to contracts above $1,000,000. The Councils decline to change the dollar threshold.

Comment: One respondent recommended revising the proposed rule to require contractors and subcontractors to notify employees and independent contractors that employers cannot force them to enter into a predispute arbitration agreement for disputes arising out of Title VII or torts related to sexual assault or harassment, and that compulsory predispute arbitration agreements violate the Federal contract.

Response: The Councils decline to insert a requirement for notification to employees and independent contractors as the E.O. does not require such a notice.

Comment: Several respondents recommended that the final rule adopt the interpretation given to the term "contractor" by DoD under the Franken Amendment, section 8116 of the Department of Defense Appropriations Act for Fiscal Year 2010, Public Law 111–118, that the term "contractor" is narrowly applied only to the entity that has the contract. Unless a parent or subsidiary corporation is a party to the contract, it is not affected.

Response: The final rule does not expand "contractor" to include parents and subsidiaries. Consistent with the standard interpretation of contractor as used in the FAR and the Defense Federal Acquisition Regulation Supplement (DFARS), it is limited to the entity awarded the contract. (Also see Section III.B.3.e. above).

Comment: Another respondent recommended the final rule specify that the arbitration limitations do not apply to commercial items or COTS items.

Response: As required by the E.O., the clause prescription at FAR 22.2007(f) specifies an exception for commercial items. The policies that apply to commercial items also apply to COTS (see FAR 12.103), therefore COTS are likewise excepted from the arbitration clause.

Comment: A respondent provided an additional argument in support of the limitation on arbitration. Forced arbitration clauses are also used to limit the ability of employees to bring class claims. Further, an employee might be too afraid to pursue a civil rights or sexual assault related claim on her own. However, class actions allow employees who have suffered a common harm to hold their employer accountable no matter the disparity in resources. Indeed, class claims are powerful tools that deter bad behaviors and allow employees to rectify employer wrongs. Eliminating forced arbitration clauses will protect employees' ability to bring class claims and therefore safeguard important employee rights.

Response: The Councils appreciate the respondent's comment.

10. Information Systems

a. The Government Should Have a Public Data Base of All Labor Law Violations

Comment: Several respondents recommended a searchable, public Web site containing labor law violation information accessible to contracting officers and prime contractors for their use in making labor law compliance determinations, and increasing public involvement. A respondent suggested that a public data base is the most effective means to improve transparency and capture contractor misrepresentations or ongoing violations, and would increase incentives to comply with labor laws. A respondent provided examples of existing Federal Web sites that allow the public and enforcement agencies to benefit from mutual access to information.

Response: Although a public data base containing information on entities and their labor law violations would enhance transparency, creation of such a system to implement the E.O. is beyond the purview of the FAR Council (see Section 4 of the E.O.).

b. Data Base for Subcontractor Disclosures

Introductory Summary

As stated in section III.B.5, the final rule requires subcontractors to disclose details regarding labor law decisions directly to DOL for review and assessment. Such disclosures will be provided to DOL through the DOL Web site at *www.dol.gov/fairpayandsafeworkplaces* (see FAR 52.222–59 (c)). At the time of rule publication, this subcontractor disclosure DOL Web site is under development; it will be functional 60 days prior to the initiation of subcontractor disclosures.

Comment: Respondents including the SBA Office of Advocacy, stated the rule lacks a system to track subcontractor labor law violations. One respondent recommended establishing a single reporting portal for all subcontractors through SAM, as many subcontractors are also prime contractors. The respondent believed it would greatly reduce the significant reporting burden if the Government provided a common, public place for subcontractor disclosures. The existing SAM system is utilized in the contracting process, and could aggregate the data and avoid the added expense of creating new data bases and interfaces.

Response: The E.O. requires that prime contractors report certain information about the labor law decisions rendered against them. The FAR implementation requires that the information is input in SAM and will be publicly disclosed in FAPIIS. There is no requirement for public disclosure of subcontractor violations. The process for subcontractor disclosures is streamlined in the alternative implemented in the final rule. Rather than providing their disclosures to each prime contractor, subcontractors will instead provide disclosures to a single site within DOL (see FAR 52.222–59(c)(3)(iv)).

c. Posting Names of Prospective Contractors Undergoing a Responsibility Determination and Contractor Mitigating Information

Comment: One respondent stated contracting officers should regularly post the names of prospective contractors undergoing a responsibility determination in a publicly available place so that interested parties can know that a prospective contractor is undergoing review.

Response: The FAR implementation of this E.O. does not alter existing processes for conducting the responsibility determination. The names of contractors undergoing a responsibility determination are Source Selection Information and cannot be disclosed.

Comment: One respondent recommended the final rule require the public disclosure of documents the contractor submits to demonstrate its responsibility, namely those describing mitigating circumstances, remedial measures, and other steps taken to achieve compliance with labor laws. These additional disclosures would greatly benefit the public without imposing an undue burden on the Government.

Response: The E.O. does not require, and the FAR implementation does not contemplate, public disclosure of documents submitted by the contractor to demonstrate its responsibility, unless the contractor determines that it wants this information to be made public. See FAR 22.1004–2(b)(1)(ii).

d. Method To Protect Sensitive Information Needed

Comment: One respondent stated the proposed rule requires disclosure of sensitive corporate information to prime contractors and does not adequately establish protocols to protect the required information. The respondent noted the rule requires the collection by prime contractors of labor law compliance data from subcontractors. The respondent believed the proposed rule should provide guidance to subcontractors supplying the information to redact or otherwise protect sensitive information from risk of exposure.

Response: Contractors and subcontractors exchange sensitive corporate information and have associated protocols to protect the information. In addition, the amount of sensitive information exchanged should be minimized under the final rule, which revised the clause at FAR 52.222–59(c) and (d) to require prime contractors to direct that subcontractor information shall be submitted to DOL, and not to the prime contractor.

e. Information in System for Award Management (SAM) and Federal Awardee Performance and Integrity Information System (FAPIIS)

Comment: One respondent cited the policy at FAR 22.2004–3(a) includes "whether" there have been labor law violations pursuant to the clause at FAR 52.222–59(b). Both SAM representations and certifications and the SAM reporting module will include information on "whether" there have been any reportable violations of labor laws. However, the respondent asserted that these two parts of SAM often would be subject to different three-year timeframes thereby creating potential confusion and ambiguity.

Response: The proposed rule's reference to a separate SAM reporting module is removed in the final rule. All information is disclosed into SAM. Contractors must ensure information in SAM is accurate, current, and complete each time data is input or updated in SAM.

Comment: One respondent stated that the proposed rule provided no mechanism for posting a contractor's vindication of a labor law violation previously disclosed in SAM. The respondent is concerned that contractors would be forever harmed by the required reporting of incomplete, nonfinal information, without an effective remedy.

Response: Contractors are encouraged to maintain an accurate and complete SAM registration and may update their information in SAM any time the information changes.

Comment: One respondent stated the proposed rule does not clarify whether companies must submit labor law violation information to FAPIIS pursuant to each contract or whether a company may update the information once every six months to cover the reporting requirements for all of their contracts.

Response: The companies do not submit this semiannual update information to FAPIIS but to SAM. The final rule has been revised to clarify that contractors have flexibility in establishing the date for the semiannual update; they may use the six-month anniversary date of contract award, or may choose a different date before that six-month anniversary date to achieve compliance with this requirement. In either case, the contractor must continue to update it semiannually. Registrations in SAM are required to be current, accurate, and complete (see FAR 52.204–13). If the SAM registration date is less than six months old, this will be evidence to the Government that the required representation and disclosure information is updated and the requirement is met. The revised language should provide contractors with more flexibility for compliance with the semiannual requirement.

Comment: One respondent stated the final rule should require that more labor law violation data be made publicly available on the FAPIIS database. The respondent recommended adding the following to the public disclosure requirement: (1) The address(es) of the worksite where the violation took place; and (2) the amount(s) of any penalties or fines assessed and any back wages due as a result of the violation.

Response: The FAR rule implements the E.O. by requiring the minimum information necessary; requiring any additional information would unnecessarily increase the burden on the public.

Comment: Respondents expressed concern that the development of the centralized electronic database for reporting of labor law compliance information has not been completed.

Response: The next release of Government changes to SAM, scheduled for October 28, 2016, will collect the following data fields for each labor law decision required by FAR 52.212–3(s)(3)(a) and FAR 52.222–59(b)(1)(i), based on the information the Entity provides when directed to report the details in SAM by a contracting officer:

- The labor law violated;
- The case number, inspection number, charge number, docket number, or other unique identification number;
- The date rendered; and
- The name of the court, arbitrator(s), agency, board, or commission rendering the determination or decision;

Similarly, FAPIIS will be prepared to publicly display such information, if appropriate.

Comment: One respondent observed that the proposed rule imposes requirements that are more onerous than those imposed by FAPIIS. Specifically, FAPIIS provides the contractor with a mechanism to object to the public posting of information that is subject to FOIA protections from disclosure. The respondent noted FAPIIS reporting also permits the contractor to provide its comments along with the reported violation, so that the reported matter is viewed in context.

Response: The Councils note that the final rule has been revised so that contractors provide mitigating factors in SAM for the contracting officer's consideration; this information will not be made public unless the contractor determines that it wants this information to be made public.

Comment: One respondent stated that FAPIIS was established to create a "one-stop" resource for contracting officers reviewing the background of prime contract offerors. In implementing FAPIIS, the FAR Council identified existing sources of information that would not require the creation of additional information submissions. If no existing source was found, preference was given to obtaining information from Government sources rather than contractors. The respondent stated that FAPIIS applies only to reporting covered proceedings in connection with the award to or performance by the offeror of a Federal contract or grant and this limits the scope of FAPIIS reporting to matters that have a nexus to a contractor's contracting relationship with the Federal Government.

Response: In order to maximize efficiency by leveraging an existing and known system, the E.O. identified FAPIIS for the display of labor law decision disclosures. The FAPIIS statute does not require that proceedings involve award or performance of a Federal contract or grant (see for example paragraph (c)(8) of 41 U.S.C. 2313 on blocked persons lists).

f. Contractor Performance Assessment Reporting System (CPARS)

Comment: A respondent was concerned that the alternative proposed rule language at FAR 22.2004–5 is overly broad and past performance reports should require a clear connection between the labor law performance issue and the contract action being reported in CPARS. Any discussion in the past performance report should have arisen directly under the contractor's performance of the contract action being reported in CPARS, or at a minimum the labor law performance issue should be connected to a substantially similar labor law issue that was considered during the initial responsibility determination for the contract action subject to CPARS reporting. The respondent believed that labor compliance agreements having no connection to the contract action being reported in CPARS should be excluded from the contractor's performance report.

Response: Contracting officers address regulatory compliance, including compliance with labor laws, as appropriate. The Councils have not incorporated the alternative supplemental FAR language at FAR 22.2004–5. However, the final rule has been revised to include a contractor's relevant labor law compliance and the extent to which the prime contractor addressed labor law violations by its subcontractors in preparation of past performance evaluations (see FAR 42.1502(j)).

g. Chief Acquisition Officer Council's National Dialogue on Information Technology

Comment: One respondent expressed concern that the proposed rule required a single Web site for all Federal contract reporting requirements and commented on the reference in the proposed rule to the National Dialogue, which is an interagency campaign to solicit feedback on how to reduce burdens and streamline the procurement process. The respondent noted the National Dialogue Web site contained no information related to implementation of E.O. 13673. The respondent requested that the FAR Council re-open the public comment period after sufficient information has been made available on the Web site to allow for meaningful input.

Response: The reference to the National Dialogue in the preamble was to inform the public and encourage participation in the National Dialogue and Pilot to reduce reporting compliance costs for Federal contractors and grantees. The proposed rule advised that such comments would not be considered public comments for purposes of this rulemaking.

h. Difficulty for Contractors To Develop Their Own Information Technology System

Comment: One respondent stated that contractors do not currently have centralized systems in place to capture information required by the proposed rule and DOL Guidance. The respondent commented that existing systems do not have the reliability needed to make representations as prime contractors or subcontractors, or assess reports from subcontractors. The respondent stated that it is not feasible to develop information technology solutions to comply until the requirements are known. Additionally, the respondent stated that contractors cannot implement solutions until the scope of the State law requirement is clear. The respondent indicated that the challenge facing the Government is similar: Neither contracting agencies nor DOL can develop reliable guidance or internal processes with undefined requirements.

Response: The Councils recognize that developing information systems is challenging for contractors, especially large contractors with multiple locations. Although the rule does not contain an explicit requirement for contractors to establish independent IT systems, the Councils recognize that many contractors and subcontractors will elect to create or modify administrative and information management systems to manage and comply with the rule's requirements. See also discussion at Section III.B.1.c. above.

11. Small Business Concerns

Introductory Summary: To the extent practicable, the E.O. and implementing FAR rule minimize the compliance burden for Federal contractors and subcontractors and in particular small businesses by: (1) Limiting disclosure requirements, for the first six months to contracts for $50 million or more, and subsequently to contracts over $500,000, and subcontracts over $500,000 excluding COTS items, which excludes the vast majority of transactions performed by small businesses; (2) limiting initial disclosure from offerors to a representation of whether the offeror has any covered labor law decisions and generally requiring more detailed disclosures only from the apparent awardee; (3) only requiring postaward updates semiannually; (4) creating certainty for contractors by having ALCAs coordinate through DOL to promote consistent responses across Government agencies regarding assessments of disclosed labor law violations; (5) phasing in disclosure requirements for subcontractor flowdown so that contractors and subcontractors have an opportunity to become acclimated to new processes; (6) establishing the alternative subcontractor disclosure approach that directs the prime contractor to have their subcontractor disclose labor law decisions and mitigating information to DOL; and (7) emphasizing in the final rule that labor law decisions do not automatically render the offeror nonresponsible (see FAR 22.2004-2(b)(6) and an equivalent statement at FAR 52.222-59(c)(2) for assessment of subcontractors). In addition, DOL encourages companies to work with DOL and other enforcement agencies to remedy potential problems independent of the procurement process so companies can give their full attention to the procurement process when a solicitation of interest is issued (See DOL Guidance Section VI, Preassessment). Language is added at FAR 52.222-59(c)(2) that the prime contractor should encourage prospective subcontractors to contact DOL for a preassessment of their record of labor law compliance.

The RIA includes estimates of all costs associated with the rulemaking and an assessment and (to the extent feasible) a quantification and monetization of benefits and costs anticipated to result from the proposed action and from alternative regulatory actions. The Regulatory Flexibility Act (RFA) requires Federal agencies to consider the impact of regulations on small entities in developing regulations. If a proposed rule is expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis must be prepared.

Comment: Respondents, including the SBA Office of Advocacy, asked for clarification of three aspects of applying FAR subpart 19.6, Certificates of Competency and Determinations of Responsibility, under the final rule. Specifically, they asked whether: (1) A Certificate of Competency (COC) would apply if a contracting officer determines an apparent successful small business lacks responsibility due to a labor law violation, (2) under a COC the contracting agency's ALCA or an ALCA at the SBA would make the final determination of whether a small business is responsible, and (3) a system for COC could be set up for small business subcontractors.

Response: The E.O. and FAR rule do not make any changes to the SBA COC program or require a new COC system to be established for small subcontractors. Contracting officers are required to refer small businesses that are found nonresponsible to the SBA (see FAR 9.103(b) and 19.601(c)), and the final rule reiterates that nonresponsibility determinations must be referred to SBA (see FAR 22.2004-2(b)(5)(iv)). The SBA certifies responsibility for small businesses under the SBA COC program, applying existing processes and procedures for COCs. Consistent with existing FAR 9.104-4(a), prime contractors make responsibility determinations for their prospective subcontractors. The COC program does not apply to determination of subcontractor responsibility. The ALCA is not involved in making the responsibility determination.

Comment: Respondents, including the SBA Office of Advocacy, raised a number of concerns that the rule would drive out small businesses, including specialized information technology firms, from Government procurement. A number of the concerns related to cost implications including additional compliance costs and delays in processing contracts, lack of resources to compile and/or assess reports of labor law violations and unwillingness to take on the risk of making a false statement to the Government, lack of profitability due to the cost burden (a particular concern of the SBA Office of Advocacy), and no existing systems for small businesses to track their own labor law violations or those of subcontractors. The SBA Office of Advocacy recommended a phase-in period for small businesses.

Response: Federal contractors will undertake the necessary due diligence to fully comply with the requirements of the E.O. and the final rule. Steps were taken to minimize the impact on small businesses as described in the introductory summary to this section III.B.11. With regard to the risk of making a false statement, see the discussion above at Section III.B.1.c. With regard to the risk of false statements by subcontractors, FAR 52.222-58(b)(2) and 52.222-59(f) are revised to read that "A contractor or subcontractor, acting in good faith, is not liable for misrepresentations made by its subcontractors about labor law decisions or about labor compliance agreements."

Comment: Respondents, including the SBA Office of Advocacy, expressed concern that the Initial Regulatory Flexibility Analysis (IRFA) of the proposed rule is flawed in a number of ways and is in violation of the Regulatory Flexibility Act. The flaws described by the respondents included:

- Presumption that the $500,000 applicability threshold will minimize impact to small businesses, given that long-term supplier agreements with small businesses are likely to exceed this threshold;
- Reliance on different metrics to determine the percentage of entities with labor law violations (respondent suggested using firms versus entities);
- Failure to compare the compliance burden on the typical small business in relevant terms to the burden on other affected businesses; and
- Reliance on Federal Procurement Data System (FPDS) data to determine the proportion of small versus large subcontractors.

Response: The Councils have considered concerns raised by respondents regarding IRFA concerns and provide the following in response:

- The E.O. provides no exclusion for supplier agreements. Supplier agreements are used between a company and its supplier, are typically for products, and range in contract value. However, the exemption for COTS items, and the $500,000 and above threshold, should minimize the number of supplier agreements with small businesses that are covered by the E.O.

- The FAR Council worked closely with DOL in developing the final RIA for this rule. In response to public comments, DOL reexamined the methodology used to develop the estimated percentage of likely violators and has revised the estimate for all entities from 4.05 percent to 9.67 percent. For a detailed discussion of the estimating methodology, please see the final RIA. The Final Regulatory Flexibility Analysis (FRFA) has been prepared using the 9.67 percent estimate developed for the RIA.
- The FAR Council, working closely with DOL, developed the regulatory compliance burden estimates used in the analyses prepared for this final rulemaking. In response to public comments, relative size structure and complexity of small and other than small businesses has been considered and taken into account in developing the burden estimates. The Government does not collect data that easily translates into such a stratification of business size and complexity, however, where it was feasible and lent greater realism to the estimates, it has been considered, *e.g.,* estimates of tracking system costs. For a more detailed discussion of how relative business size and complexity have been considered, see the final RIA.
- The Government's procurement data source is FPDS, and this data system is used in preparing estimates for procurement regulatory actions. For each procurement, FPDS contains a data field that indicates whether the procurement is awarded to a small business or an other than small business. As the Government has no other comparable data source for business size of subcontractors, the approximate percentage of small versus large businesses represented in FPDS was applied, as an estimating methodology, in developing the estimated population of subcontractors.

Comment: Respondents stated the Government failed to articulate in the IRFA a rational basis for its decision to promulgate the rule, in violation of the Regulatory Flexibility Act. Specifically, respondents contended that the Government merely regurgitated the substance of E.O. 13673, made a conclusory statement that the rule would reinforce protections for workers, and made a conclusory statement that the rule would ensure the Government contracted with companies with a satisfactory record of business ethics.

Response: The FAR Council examined a number of options and combinations of options to meet the requirements of the E.O., achieve the objectives of the E.O., and minimize burden on industry, especially small businesses. The introductory summary to this section III.B.11. describes the results of this examination of options, which include implementing the alternative for subcontractor labor law decision disclosures to DOL instead of to the prime contractor. This alternative approach is expected to reduce the compliance burden of this regulatory action for primes and subcontractors and will benefit small businesses, particularly small business prime contractors. The FRFA contains discussion of the examination and consideration of these options.

Although it is not possible to guarantee the Government only contracts with companies with integrity and business ethics, the E.O. and the rule are expected to greatly increase the Government's ability to contract with companies that regularly comply with labor laws, as the rule and DOL Guidance provide a structural foundation and assistance to companies that do business with the Government to continually improve their compliance with labor laws.

Comment: Respondents stated the Government failed to identify in the IRFA any significant alternatives to the rule that accomplished the rule's stated objectives while minimizing any significant economic impact on small entities, in violation of the Regulatory Flexibility Act. For example, the respondents indicated that Government did not analyze the recordkeeping or ongoing compliance costs that will be imposed on small businesses. In addition, Federal dollars would be better spent improving existing processes rather than requiring contractors to collect data and self-report.

Response: In the proposed rule the FAR Council recognized that the rule would impose recordkeeping and ongoing compliance costs. The FAR Council requested input from the public regarding what types of recordkeeping systems it might employ to develop and maintain compliance, and what costs might be incurred to initialize and maintain such systems. The final rule analyses (RIA, PRA Supporting Statement, and FRFA) have been developed to include estimates for such costs. The Government remains committed to ongoing efforts to improve its ability to retrieve data from the various enforcement agencies. As these abilities are developed and improved, the Government will continue to consider the most efficient means to meet the requirements and objective of the E.O. and minimize compliance burden on industry, especially small businesses.

Comment: One respondent stated the Government failed to identify in the IRFA any relevant Federal rules which may duplicate, overlap, or conflict with the rule, in violation of the Regulatory Flexibility Act. In particular, the respondent asserted that the rule conflicts with suspension and debarment procedures because Congress determined the suspension and debarment remedy should be available for only two of the statutes identified in E.O. 13673: The Davis-Bacon Act and the Service Contract Act. The respondent also asserted that each of the 14 labor laws already have complex enforcement mechanisms and remedial schemes, and only some of those allow for the denial of a Federal contract as a result of a violation.

Response: The Councils do not find that the rule conflicts with existing procedures for suspension and debarment. The rule creates procedures associated with the award of individual contracts. Suspension and debarment applies to contracts across all Federal agencies. Suspension and debarment procedures and labor law enforcement procedures are independent of one another. Companies who have violated labor laws respond to the enforcing agency or body that found the violation. Suspension and debarment actions are taken by Suspending and Debarring Officials to protect the Government's interest when a company's record of integrity and business ethics indicates cause for concern. The actions of an enforcement agency when it issues an administrative merits determination for a labor law violation, and the procurement system's use of the suspension and debarment process, are independent of each other. For additional discussion see Section III.B.1 of this preamble.

Comment: Respondents expressed concern that small businesses (especially Service-Disabled Veteran-Owned, Women-owned and HUBzone small businesses) would not have the resources to collect and assess information on the labor law violations of large contractors, including Fortune 500 companies, that serve as their subcontractors.

Response: The Councils acknowledge that small business prime contractors may have larger firms as subcontractors, and the assessment of the labor law violations of a large firm may be especially difficult for the small prime contractor. The Councils have revised the final rule at FAR 52.222–59(c) to incorporate the alternative presented in the proposed rule, whereby subcontractors provide their labor law decision disclosures (including mitigating factors and remedial measures) to DOL (see introductory summary to Section III.B.5). DOL will assess the violations and advise the subcontractor who will make a representation and statement to the prime contractor pursuant to FAR 52.222–59(c)(4)(ii). A great deal of the burden to prime contractors, including small business prime contractors, thus has been reduced. If DOL does not provide a timely response, the final rule provides that the prime contractor may proceed with making a responsibility determination using available information and business judgment, including whether, given the circumstances, it can await DOL analysis, see FAR 52.222–59(c)(6).

Comment: Respondents expressed concerns that the DOL Guidance was devoid of any instructions on how the size of a contractor could impact an analysis of whether a business had "pervasive" violations and therefore could be applied inequitably against small businesses. In addition, a respondent expressed concern that there was no definition in the DOL Guidance of what constituted a small, medium, or large contractor.

Response: Contractor size standards are the purview of the SBA and are specific to the procurement's assigned North American Industry Classification System (NAICS) code. However, in response to these comments in its Preamble to the final Guidance, DOL explains that it declines to eliminate the company-size factor because the E.O. explicitly requires the Department to "take into account . . . the aggregate number of violations of requirements in relation to the size of the entity." See E.O. Section 4(b)(i)(B)(4). DOL notes that the size of the employer will be one factor among many assessed when considering whether violations are pervasive. Likewise, DOL declines to establish specific criteria for how company size will affect the determination of pervasive violations. Violations vary significantly, making the imposition of bright-line rules for company size inadvisable. However, the final DOL Guidance in Appendix D provides examples that note in most of the examples the number of employees for the contractor. The examples illustrate circumstances under which violations may be classified as pervasive.

Comment: One respondent stated the Government violated the Regulatory Flexibility Act by failing to identify or consider in the IRFA the burden of compliance faced by small entities such as small towns, small nonprofit organizations, and small school systems.

Response: To the extent that small towns, nonprofit organizations, and school systems are engaged in Federal procurement contracts, award information to these entities is reported in FPDS. The FRFA addresses the impact on small entities such as small towns, small nonprofit organizations, and small school systems.

Comment: A respondent expressed concern about small businesses' ability to monitor subcontractor compliance near the threshold value of $500,000, and suggested raising the threshold to $3 million for small business prime contractors.

Response: The E.O. set the $500,000 applicability threshold in order to minimize impact on small business and to be consistent with current procurement practices, including the then-existing FAPIIS reporting threshold ($500,000 when the E.O. was signed). The threshold in the FAR rule will remain at $500,000.

Comment: Respondents, including the SBA Office of Advocacy, expressed concerns that prime contractors will avoid contracting with a small business that has a labor law violation, rather than wait for the outcome of a responsibility determination, and that it would be difficult and costly to find new subcontractors.

Response: The existence of a single labor law decision is not cause for disqualification; however, if a subcontractor is found to be nonresponsible, then it is appropriate to select a more suitable source. All businesses with labor law violations, including small business subcontractors, are encouraged to remediate violations and consult early with DOL. In addition, the Councils have revised the final rule to implement the alternative approach provided in the proposed rule, whereby subcontractor labor law information (including decisions, mitigating factors, and remedial measures) is submitted to DOL and DOL assesses the violations (FAR 52.222–59(c)). (See introductory summary to Section III.B.5.) This revised implementation is designed to, among other things, lessen the concerns of prime contractors so that they will continue subcontracting with small businesses.

The final rule has been revised at FAR 22.2004–2(b)(6) to clarify that for prime contractors "[d]isclosure of labor law decision(s) does not automatically render the offeror nonresponsible" and "[t]he contracting officer shall consider the offeror for contract award notwithstanding disclosure of one or more labor law decision(s)." Similar language is added at FAR 52.222–59(c)(2) regarding subcontractor violations.

Comment: The SBA Office of Advocacy stated the proposed regulation underestimated the rule's "quantifiable cost" to the public, and recommended that the Council and DOL provide more clarity as to the actual cost of compliance for small entities acting as prime contractors and as subcontractors. As an example, the respondent said the Government's calculation did not reflect additional time and cost to review phase two of the DOL Guidance and the revised FAR rule, nor did it include any costs for review of current State labor laws.

Response: In preparing the analyses (RIA, PRA Supporting Statement, FRFA) for the final rule, DOL and the FAR Council considered public comments and have adjusted the estimates of quantifiable costs of compliance with the regulation, including the costs for regulatory review and familiarization. DOL and the FAR Council have also paid particular attention to, and where appropriate have noted more clearly, the estimates of costs of compliance for small entities acting as prime contractors and as subcontractors. The proposed and final FAR rules do not address the cost of reporting violations related to equivalent State laws (other than OSHA-approved State Plans) because the rule and DOL's Guidance do not implement those requirements of E.O. 13673. (See also the discussion above at Section III.B.1.d.)

Comment: The SBA Office of Advocacy recommended that the IRFA be amended to reflect the costs that are cited in the RIA. The Office of Advocacy suggested that to further support the importance of this cost data, once such data are made more readily available, the Council should extend the public comment period for 30 days.

Response: The RIA includes estimates of all costs associated with the rulemaking and an assessment and (to the extent feasible) a quantification and monetization of benefits and costs anticipated to result from the proposed action and from alternative regulatory actions. The Regulatory Flexibility Act (RFA) requires Federal agencies to consider the impact of regulations on small entities in developing regulations. If a proposed rule is expected to have a significant economic impact on a substantial number of small entities, an initial regulatory flexibility analysis must be prepared. A summary of the proposed RIA and IRFA were published with the proposed rule and full documents were available for review by the general public. The public comment period deadline was extended twice from the original closing date of July 27, 2015, to August 11, 2015, and again to August 26, 2015, to provide additional time for interested parties to review and provide comments on the FAR case including the RIA and IRFA. Those comments have been reviewed and considered in the development of the final RIA and FRFA.

Comment: A respondent suggested exempting small businesses to lessen burden.

Response: The objective of the E.O. is to increase the ability of the Government to award contracts to contractors that are compliant with labor laws and as such does not exempt small businesses. However, the E.O. and the FAR rule were designed to minimize the burden associated with the required disclosure for Federal contractors and subcontractors, especially small businesses.

Comment: A respondent suggested the Government allow small business to submit their filings to one central database in order to lessen the burden on small businesses.

Response: In regard to prime contractors (including small businesses), the initial representations are completed in SAM. If, at responsibility determination, disclosures are required, they will likewise be made in SAM. For subcontractors (including small business subcontractors), the Councils have revised paragraphs (c) and (d) of the FAR clause 52.222–59, Compliance With Labor Laws (Executive Order 13673), in the final rule to implement the alternative presented in the proposed rule for subcontract labor law violations to be disclosed to DOL. (See the introductory summary to Section III.B.5.) This eliminates the requirement for subcontractors to disclose to each of their contractors, reducing the compliance burden for small businesses whether in the capacity of primes or subcontractors.

Comment: A respondent suggested that the IRFA's discussion of alternatives to subcontractor reporting overstates the obligation of the prime contractor to make a subcontractor responsibility determination.

Response: Consistent with existing procurement practice and FAR 9.104–4(a), prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors.

12. State Laws

a. OSHA-Approved State Plans

The E.O. directs DOL to define the State laws that are equivalent to the 14 identified Federal labor laws and executive orders. See E.O. Section 2(a)(i)(O). The proposed DOL Guidance stated that OSHA-approved State Plans are equivalent State laws for purposes of the E.O.'s disclosure requirements because the OSH Act permits certain States to administer OSHA-approved State occupational safety-and-health plans in lieu of Federal enforcement of the OSH Act. See 80 FR 30574, 30579.

Comment: Several respondents addressed the inclusion of OSHA-approved State Plans as equivalent State laws. One respondent agreed that State Plans are equivalent to the OSH Act, as the State Plans function in lieu of the OSH Act in those States, and a second respondent called it "essential" to the E.O.'s purpose that both the OSH Act and "its State law equivalents" be included.

In contrast, another respondent argued that the State Plans are not equivalent State laws. The respondent noted that, under Section 18 of the OSH Act, the State Plans must be "at least as effective" as OSHA's program, and therefore may be more protective than OSHA's requirements.

Response: DOL responds to these comments in its Preamble to the final DOL Guidance. See DOL Preamble Section-by-Section Analysis, II.B., coverage of "OSHA State Plans". DOL did not modify this aspect of the Guidance. The Councils agree with DOL. Equivalent State laws do not need to be identical to Federal laws, and failing to include the OSHA-approved State Plans would lead to a gap in coverage. The OSHA-approved State Plans can be found at *www.osha.gov/dcsp/osp/approved_state_plans.html.*

b. Phased Implementation of Equivalent State Laws

The proposed Guidance provided that DOL will identify additional equivalent State laws in a second Guidance to be published in the **Federal Register** at a later date.

Comment: Several respondents expressed concern that the Guidance is incomplete without identification of all equivalent State laws. A number of them argued that without the second Guidance employers are unable to estimate the costs associated with implementing the E.O., including the disclosure requirements. One respondent asserted that by failing to identify equivalent State laws, the proposed Guidance ignored the costs of tracking and disclosing violations of potentially hundreds of additional laws and the potential costs of entering into labor compliance agreements with respect to those additional laws. Some industry respondents called for a delay of the implementation of the E.O.'s requirements until guidance identifying the equivalent State laws is issued. Another respondent requested that the second Guidance not be issued at all because the requirement will be "unworkable." Others encouraged DOL to issue the second Guidance "swiftly" before the end of 2015.

Response: DOL responds to these comments in its Preamble to the final DOL Guidance. See DOL Preamble Section VIII. Effective date and phase-in of requirements, coverage of "Phased implementation of equivalent state laws". DOL did not modify this aspect of the Guidance. The Councils agree with DOL. DOL plans to identify the equivalent State laws in a second Guidance published in the **Federal Register** at a later date.

That second Guidance will be subject to notice and comment, and the FAR Council will engage in an accompanying rulemaking that will include the costs of disclosing labor law decisions concerning violations of equivalent State laws, and address applicable requirements of the CRA, SBREFA, RFA, and E.O. 12866. Delaying implementation of all of the E.O.'s requirements until DOL completes the second Guidance will not serve to promote the E.O.'s goal of improving the Federal contracting process and would have negative consequences on the economy and efficiency of Federal contracting by allowing contractors who have unsatisfactory records of compliance with the 14 Federal labor laws identified in the Order, and OSHA-approved State Plans, to secure new contracts in the interim. The proposed and final FAR rules do not address the cost of reporting violations related to equivalent State laws (other than OSHA-approved State Plans) because the rule and DOL's Guidance do not implement those requirements of E.O. 13673. (See also the discussion at Section III.B.1.d.)

13. DOL Guidance Content Pertaining to Disclosure Requirements

Introductory Summary: The Councils received various responses concerning matters addressed by DOL Guidance and applied in the proposed rule. The E.O., Section 2, provides, in relevant part, that DOL Guidance will define "administrative merits determination, arbitral award or decision, or civil judgment . . . rendered . . . for violations of any of the [listed] labor laws and Executive Orders (labor laws).'' The E.O., Section 4(b), states, in relevant part, that DOL ''shall (i) develop guidance . . . to assist agencies in determining whether administrative merits determinations, arbitral awards or decisions, or civil judgments were issued for serious, repeated, willful, or pervasive violations of these requirements for purposes of implementation of any final rule issued by the FAR Council pursuant to this order.'' DOL analyzed public comments, and developed definitions which the FAR Council is adopting in its final rule. The DOL Guidance was initially published concurrent with this FAR rule and significant revisions to the Guidance will be published for public comment. DOL's analysis is referred to below; for more detail see the DOL Preamble published today accompanying the DOL Guidance.

a. General Comments

Comment: Respondents, including the SBA Office of Advocacy, contested the proposed rule's incorporation by reference of the DOL Guidance. Some respondents asserted that because the DOL Guidance is explicitly incorporated in the FAR, it is a *de facto* regulatory provision that must be subject to notice-and-comment rulemaking. Other respondents said that any future changes to the DOL Guidance must also be subject to notice-and-comment rulemaking. One respondent said the current approach, which incorporates the DOL Guidance into the FAR, is a violation of the APA. One respondent requested the withdrawal of the DOL Guidance.

Response: The Councils disagree that references in the rule to DOL's Guidance, such as for purposes of determining whether a labor law violation is serious, repeated, willful and/or pervasive, conflict with the APA, 5 U.S.C. 553(b). The E.O. charges DOL with developing guidance on, among other things, the definitions of those specific terms. The rule accordingly relies on those definitions. Moreover, whether or not required, DOL satisfied the APA by publishing the proposed Guidance in the **Federal Register** and soliciting and then considering comments before issuing the final Guidance. The FAR 22.2002 definition of ''DOL Guidance'' includes an acknowledgement that significant revisions will be published for public comment in the **Federal Register**.

Comment: One respondent requested that DOL provide a ''preclearance'' process for contractors who have no labor law violations, or have remedied any reportable labor law violations. The respondent also requested the names of precleared contractors be made publicly available.

Response: DOL has provided a preassessment process for prospective prime contractors and subcontractors, covered in the DOL Guidance at Section VI. However, the FAR does not cover a preassessment process because it takes place prior to the procurement process. Concerning covered subcontractors, the final rule has been modified to clarify that contractors shall direct their prospective subcontractors to submit labor law violation information (including mitigating factors and remedial measures) to DOL. (See introductory summary to Section III.B.5.) Contractors will consider DOL analysis and advice as they make responsibility determinations on their prospective subcontractors. See FAR 22.2004–1(b), 52.222–58, and 52.222–59(c) and (d).

Comment: One respondent commented that if the Government chooses to apply the E.O. to subcontractors, the definition of ''subcontract'' and ''subcontractor'' should be modified. It stated that the proposed DOL Guidance definitions were inconsistent with the FAR part 44 provisions on subcontracting, which narrowly define a ''subcontract'' and ''subcontractor.''

Response: The DOL Guidance is not inconsistent with the definitions of ''subcontract'' and ''subcontractor'' in FAR part 44. Unlike FAR part 44, the DOL Guidance does not specifically define these terms. Rather, it defines the term ''covered subcontract''—meaning a subcontract that is covered by the E.O. It describes how it uses the term ''subcontractor,'' for ease of reference both to subcontractors and prospective subcontractors. Neither of these uses of the terms are inconsistent with FAR part 44. The definition of ''covered subcontract'' in the DOL Guidance is consistent with sections 2(a)(i) and (iv) of the E.O. which limit applicability to prime contracts exceeding $500,000, and any subcontracts exceeding $500,000 except for acquisitions for COTS items. Prime contractors will determine applicability by following the requirement as it is outlined in FAR 52.222–59(c)(1). Consistent with the E.O., the DOL Guidance explains, among other things, that references to ''contractors'' and ''subcontractors'' include both individuals and organizations, and both offerors on and holders of contracts (see DOL Guidance, Section V, Subcontractor responsibility).

Comment: One respondent requested that a definition of ''compliant with labor laws'' be added, and that the phrase be defined as compliance with current business ethics standards.

Response: The Councils decline to add a definition of ''compliant with labor laws'' to mean compliance with current business ethics standards. While clearly compatible, the two terms are distinct and not always coextensive.

Comment: A respondent expressed concerns that DOL's Guidance permits contracting officers to take remedial measures up to and including contract termination and referral to the agency's suspending and debarring officials. They contended that the new proposals play directly into the hands of malicious third parties that seek to put unfair pressure on employers, because mere allegations of labor law violations could result in disqualification of targeted Government contractors.

Response: Contracting officers have a number of contract remedies available to them that are preexisting in the FAR. The final rule, consistent with the proposed rule, includes mention of a number of these available remedies, and also addresses the availability of a labor compliance agreement as a remedy. The DOL Guidance mentions the remedies that are addressed in the FAR. The DOL Guidance does not create or permit actions available to contracting officers. The E.O. contemplates that information regarding labor law violations will be ''obtained through other sources.'' During the postaward period, ALCAs are required to consider any information received from sources other than the Federal databases into which disclosures are made. See FAR 22.2004–3(b)(1). ALCAs will be available to receive such information from other sources. ALCAs will not recommend any action regarding alleged violations unless a labor law decision, as defined in FAR 22.2002, has been rendered against the contractor.

Comment: A respondent recommended that the rule provide that agreeing to legally enforceable protection for workers who come forward with information regarding violations is a strong mitigating factor in determining a contractor's ethics and responsibility. The respondent asserted that the best tool for ensuring that future violations do not occur are informed workers who are not afraid to step forward when a violation occurs.

Response: Although protections for workers are not addressed in the FAR rule, DOL does include consideration of such information as a mitigating factor in the Guidance at Section III.B.1., Mitigating factors that weigh in favor of a satisfactory record of Labor Law compliance, at paragraph d, which is also found in Appendix E, Assessing

Violations of the Labor Laws. The E.O. does not authorize the Councils to create an anti-retaliation mechanism for adverse actions taken against workers or others who provide information to contracting officers, ALCAs, or others. The Councils note, however, that Federal law provides whistleblower protections to employees who report fraud or other violations of the law related to Federal contracts. See, *e.g.,* FAR subpart 3.9, Whistleblower Protections for Contractor Employees.

b. Defining Violations: Administrative Merits Determinations, Arbitral Awards, and Civil Judgments

Comment: Two respondents said that administrative merits determinations by Government agencies are not and cannot be labeled as labor law violations, as proposed by FAR subpart 22.20.

Response: The E.O. requires the disclosure and weighing of administrative merits determinations, arbitral awards or decisions, and civil judgments, as defined in Guidance issued by DOL, for violations of the specified labor laws (see E.O. Section 2(a)(i)). This can include determinations, awards, decisions, and judgments subject to appeal. Challenges to the express contents of the E.O. are outside the purview of this rulemaking. (See also the discussion at Section III.B.1.b.)

Comment: One respondent requested that the regulation limit the scope of reportable labor law violations to facilities currently in use and owned by the contractor at the time of a bid, and to employees currently working under Federal contract.

Response: The Councils decline to limit disclosure requirements to facilities currently in use and owned by the contractor at the time of a bid and to employees currently working under Federal contract. Such limitations on the scope of disclosure would be inconsistent with and largely undermine the effectiveness of the E.O.

Comment: One respondent requested that the regulation clarify whether a matter qualifies as a labor law violation if it is settled or resolved in a manner that results in the elimination of the violation.

Response: While not negating the existence of an administrative merits determination, arbitral award or decision, or civil judgment (as defined in the DOL Guidance), evidence submitted of remedial measures taken to resolve or settle a labor law violation shall be considered by a contracting officer in making a responsibility determination. A private settlement, however, that occurs without a determination of a labor law violation is not a civil judgment under the E.O. In addition, as the DOL Guidance explains, a labor law decision that is reversed or vacated in its entirety need not be disclosed. (See Section II.B.4. of the Guidance.)

Comment: Respondents commented that FAR subpart 22.20 should require contractors to report only fully adjudicated labor law violations. Specifically, the respondents challenged the definition of labor law violation as including administrative merits determinations asserting that administrative merits determinations are not final, are frequently overturned in court, are not issued pursuant to proceedings that provide due process protections to contractors, and are often issued based on novel, untested theories that seek to expand or overturn existing law.

Response: The E.O. mandates the disclosure of administrative merits determinations of labor law violations. Furthermore, the Councils disagree that requiring disclosure of administrative merits determinations will interfere with due process. Existing procedural safeguards available to prospective contractors during the preaward responsibility determination, or to contractors during postaward performance, remain intact. Among other things, contractors receive notice that the responsibility determination is being made and are offered a predecisional opportunity to be heard by submission of any relevant information, including mitigating factors related to any labor law decision. Also, no limit is placed on contractors' postdecisional opportunity to be heard through existing administrative processes and the Federal courts. (See also the discussion at Section III.B.1.b.)

Comment: One respondent commented that, as with the definition of administrative merits determination, the definitions of civil judgment and arbitral award or decision are, in some instances, based on preliminary determinations or mere allegations. By requiring contractors to report such preliminary findings, the respondent contended that the DOL Guidance short-circuits due process and gives undue weight to preliminary determinations. The respondent suggested revising the definitions of "civil judgment" and "arbitral award or decision" to limit them to judgments made on the basis of a complete record, including contractor response, a decision in writing, and a finding of fault.

Response: The Councils do not agree that the definitions for civil judgment and arbitral award or decision undermine due process or are based on allegations alone and need to be limited. For purposes of the E.O., a labor law violation may exist, even if the determination is not final, or, in the case of preliminary injunctions, if there is a court order that enjoins or restrains a labor law violation.

Comment: The SBA Office of Advocacy asked on behalf of small businesses whether the rule allows for due process and stated that the implication of the rule is that a disclosure of a violation, such as administrative merits determinations, before final adjudication may result in the denial of a contract.

Response: Requiring disclosure of administrative merits determinations will not interfere with due process. Existing procedural safeguards available to prospective contractors during the preaward responsibility determination, or to contractors during postaward performance, remain intact. Among other things, contractors receive notice that the responsibility determination is being made and are offered a predecisional opportunity to be heard by submission of any relevant information, including mitigating factors related to any labor law decision. Also, no limit is placed on contractors' postdecisional opportunity to be heard through existing administrative processes and the Federal courts. (See also discussion at Section III.B.1.b.)

Comment: Respondent commented that every labor law identified in the E.O. provides due process for contractors before they can be forced to pay a fine, or comply with long term injunctive relief. However, the respondent indicated that the proposed FAR rule and proposed DOL Guidance provide virtually no due process protections. According to the respondent, basing responsibility determinations on preliminary agency findings undermines the accuracy of responsibility determinations and increases the chance that contracts will be denied due to mistakes, incompetency, and bias with little possibility of check, balance, or correction by an objective arbiter. While permitting contractors the opportunity to explain reportable incidents is a critically important component, respondent asserts that it provides little comfort to contractors who still have comparatively little real guidance about the types of conduct that will lead to the denial of Federal contracts or *de facto* debarment.

Response: Employers who receive administrative findings of labor law violations have the right to due process, including various levels of adjudication and review before administrative and judicial tribunals, depending on the labor law involved in the violation. For clarity, DOL has modified its Guidance to include an additional discussion of the three steps in the assessment and advice process: Classifying of violations, weighing of the violations and mitigating factors, and providing advice. This discussion provides extensive information about the factors that weigh in favor of a satisfactory record of labor law compliance, and those factors that weigh against. It also now contains a separate and more extensive explanation of labor compliance agreements, which are another tool that may be used to assist contractors in coming into compliance (See DOL Guidance, Section III.B. and III.C.).

Comment: One respondent commented that nonfinal violations can be later overturned, which makes the reporting unfair. The respondent asserted that the process of agency adjudication and judicial appeal often results in the initial administrative decision being overturned—yet the rule and Guidance unfairly sweep these decisions within its reach, risking loss of contracts before the employer is ultimately vindicated.

Response: The E.O., Section 2(a)(i), requires the disclosure and weighing of administrative merits determinations, arbitral awards or decisions, or civil judgments, as defined in Guidance issued by DOL, for violations of the specified labor laws and E.O.s. As the DOL Guidance explains, this can include determinations, awards, decisions, and judgments subject to appeal. The DOL Guidance explains that contractors' opportunity to provide all relevant information—including mitigating circumstances—coupled with the explicit recognition that nonfinal administrative merits determinations should be given lesser weight, addresses due process concerns. A contractor's avenues to seek due process under the statutes or E.O.s violated remain undiminished and undisturbed by the E.O. and this rule. Finally, the aim of the rule is to increase efficiency by increasing contractor compliance with the specified labor laws, not to deny contracts. Federal agencies have a duty to protect the integrity of the procurement process by contracting with responsible sources that are compliant with the terms and conditions of their contracts including labor laws.

In addition, as the DOL Guidance explains, a labor law decision that is reversed or vacated in its entirety need not be disclosed. (See Section II.B.4. of the Guidance.)

Comment: Respondent expressed concerns that the proposed rule will disqualify contractors from performing Government work because of unadjudicated agency decisions or judicial allegations.

Response: As explained in DOL's Preamble, nonfinal administrative merits determinations are not mere allegations. These determinations are made only after the agency has conducted an investigation or inspection and has concluded, based on evidentiary findings, that a violation has occurred. (See the section-by-section analysis in the Preamble to DOL Guidance at Section II.B.1.) Furthermore, the definition of administrative merits determination (see DOL Guidance Section II.B.1) is used to identify the extent of a contractor's obligation to disclose violations. Not all disclosed violations are relevant to a recommendation regarding a contractor's integrity and business ethics. Only those that are found to be serious, repeated, willful, and/or pervasive will be subsequently considered as part of the weighing step and will factor into the ALCA's written analysis and advice. Moreover, when disclosing labor law violations, a contractor has the opportunity to submit all relevant information it deems necessary to demonstrate responsibility, including mitigating factors and remedial measures such as steps taken to achieve compliance with labor laws. See FAR 22.2004–2(b)(1)(ii). The DOL Guidance provides that information that the contractor is challenging or appealing an adverse administrative merits determination will be carefully considered.

Comment: Respondents favored full disclosure of potential violations for the consideration of contracting officers. Another respondent requested that contractors not be required to disclose allegations of unlawful conduct made by employees or their representatives.

Response: The E.O. expressly provides as a threshold for disclosure an administrative merits determination, civil judgment, or arbitral award or decision of a labor law violation. For this reason, the Councils decline to add a disclosure requirement of a potential violation. An allegation alone does not mandate disclosure under the E.O. However, an allegation may lead to a determination, or the enjoining or restraining, of a labor law violation by an administrative merits determination, civil judgment, or arbitral award or decision that would need to be disclosed.

Comment: Respondents opposed the requirement that confidential arbitral awards or decisions should be reported, as this would violate State laws that enforce the terms of any confidentiality agreements contained in the arbitration award and expose contractors to suit for breach of a confidentiality provision.

Response: The E.O., Section 2(a)(i), specifically requires the disclosure of arbitral awards or decisions without exception, and confidentiality provisions in non-disclosure agreements generally have exceptions for disclosures required by law. Further, the final rule requires contractors to publicly disclose only four limited pieces of information: The labor law that was violated, the case number, the date of the award or decision, and the name of the arbitrator(s). See FAR 22.2004–2(b)(1)(i). There is nothing particularly sensitive about this information, as evidenced by the fact that parties routinely disclose this information and more when they file court actions seeking to vacate, confirm, or modify an arbitral award. While this information may not be sensitive, disclosing it to the government as part of the contracting process furthers the Executive Order's goal of ensuring that the government works with contractors that have track records of complying with labor laws.

Comment: One respondent commented that disclosure requirements should apply to private settlements in which the lawsuit is dismissed without any judgment being entered because legal actions against companies often settle without a formal judgment by a court or tribunal. The respondent suggested that the final rule should require the disclosure of labor law violation cases that were settled without a final judgment, and contracting officers should be required to assess such cases as part of the responsibility determination.

Response: Disclosure is required for civil judgments that are not final, or are subject to appeal, provided the court determined that there was a labor law violation, or enjoined or restrained a labor law violation. If a private settlement results in a lawsuit dismissed by the court without any judgment being entered of a labor law violation or without any enjoining or restraining of a labor law violation, it does not meet the definition of "civil judgment".

Comment: One respondent opposed the requirement that contractors report civil judgments that are not final, such as preliminary injunctions and temporary restraining orders.

Response: In defining "civil judgment" for the implementation of the E.O., DOL affirms that disclosure is required for court judgments and orders that are not final, or are subject to appeal, provided the court determined that there was a labor law violation, or enjoined or restrained a labor law violation. A preliminary injunction qualifies as a civil judgment if the court order or judgment enjoins or restrains a labor law violation. Temporary restraining orders, however, are not civil judgments for the purposes of the Order, and need not be disclosed. They are distinct from preliminary injunctions under the Federal Rules of Civil Procedure and can, in certain circumstances, be issued without notice to the adverse party. (See DOL Preamble, section-by-section analysis, Section II.B.2, Defining "civil judgment" and DOL Guidance Section II.B.2.)

Comment: A number of respondents requested that various violations be exempted from the disclosure requirement or that others that are not reportable be required to be disclosed.

One respondent requested that contractors not be required to disclose OSHA violations that do not occur on the premises of the contractor; two respondents requested that contractors not be required to report violations caused by the Government; two respondents requested that contractors not be required to disclose administrative merits determinations issued by a Regional Director of the National Labor Relations Board; one respondent requested that contractors be required to report violations of foreign laws similar to the 14 statutes and executive orders listed in FAR subpart 22.20; one respondent requested that contractors be required to report all health and safety violations found by any Government agency; and one respondent requested that contractors be required to disclose labor law violations that occurred only while the contractor was performing a Government contract.

Response: The E.O. required DOL to provide Guidance that includes definitions of "administrative merits determination", "arbitral award or decision", and "civil judgment". DOL proposed definitions, analyzed public comments, and has retained the essence of the proposed definitions, but has made some minor revisions. Discussion of the revisions can be found in Section II.B. of the section-by-section analysis in the Preamble to the Guidance, and the final definitions can be found in Section II.B. of the Guidance. Regarding the request that contractors not be required to report violations caused by the Government, if a violation was caused by the Government, the contractor may present this as a mitigating factor. See Section III.B.1.f. of the Guidance.

Comment: One respondent requested that contractors not be required to disclose any violation caused by a contractor acting in good faith to vindicate its rights.

Response: Disclosure of administrative merits determinations, arbitral awards or decisions, and civil judgments, as defined in Guidance issued by DOL, for violations of the specified labor laws and orders is required even if the violation occurred despite the contractor acting in good faith to vindicate its rights. As the DOL Guidance explains, however, evidence of "good faith and reasonable grounds" is a mitigating factor that weighs in favor of a recommendation that a contractor has a satisfactory record of labor law compliance. In addition, as the DOL Guidance explains, a labor law decision that is reversed or vacated in its entirety need not be disclosed. (See Section II.B.4. of the Guidance.)

Comment: Respondents requested that contractors be required to disclose allegations of retaliation.

Response: An allegation of retaliation standing alone does not mandate disclosure under the E.O. Disclosure is triggered if an allegation of retaliation, results in a determination, or enjoining, of a labor law violation by administrative merits determination, civil judgment, or arbitral award or decision. Also, as the DOL Guidance explains, evidence of retaliation related to a labor law violation weighs in favor of a serious violation classification.

Comment: Some respondents observed that criminal violations of workplace law are not addressed in the draft regulations, and that existing acquisition regulations require contractors to only report on criminal workplace law violations if they occurred while performing a Federal contract. According to them, this would potentially exclude some of the most serious violations of workplace laws.

The respondent indicated that while the E.O. does not specifically address criminal violations of workplace law, the FAR already requires disclosure of other types of criminal violations regardless of whether they occurred during the performance of a Federal contract. The respondent suggested that the final regulations should require contractors to report on criminal violations occurring on private contracts or, at the very least, allow contracting officers and compliance advisors to review this sort of information when conducting a review of a company that has disclosed other legal violations.

Response: DOL has declined to adopt this, and the Councils agree.

Comment: One respondent suggested that civil judgments and arbitral awards or decisions should concern conduct that occurred or ceased within the prior three years so that consideration is given only to reasonably current conduct and also requested that contractors be required to report only those administrative merits determinations made within the past three years.

Response: The representation required of an offeror is to represent to the best of the offeror's knowledge and belief whether there has been "an administrative merits determination, arbitral award or decision, or civil judgment for any labor law violation(s) rendered against the Offeror during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter". (See FAR 52.222–57(c).) "Rendered" refers to the date of the decision, not the date of the underlying conduct. Revisions have been made in the FAR text, including the representations, to make this clear. To facilitate initial implementation of the E.O., the final rule, and DOL Guidance, the Councils have modified provisions to require disclosures for the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter.

Comment: Respondent requested that contractors be required to disclose labor law violations that occurred only while the contractor was performing a Government contract.

Response: The Councils decline to excuse from disclosure labor law violations that occur on nonGovernmental contracts. The E.O. provides no exclusion of violations that occur while performing nongovernmental work. (See discussion at Section III.B.1.b. above.)

c. Defining the Nature of Violations

i. Serious, Repeated, Willful, and/or Pervasive Violations

Comment: Respondents stated that one or more of the definitions of "serious," "repeated," "willful," and "pervasive" in the DOL Guidance are extra-legal for various reasons, including that they are not found in a statute and are vague.

Response: E.O. section 4(b)(i) directs DOL to develop guidance to assist agencies in classifying labor law violations as serious, repeated, willful, or pervasive. The definitions are specific, thoroughly explained in DOL Guidance, and are based on concrete, factual information. (See DOL Guidance, Section III.A, Preaward assessment and advice—Classifying Labor Law violations; DOL Preamble, Section III.A, Preaward assessment and advice—Classifying Labor Law violations; also see the Appendices to the DOL Guidance.)

Comment: A number of respondents commented on the definitions of "serious," "repeated," "willful," and "pervasive".

Some respondents said the proposed definitions of "serious," "repeated," "willful," and "pervasive" found in proposed FAR subpart 22.20 are overbroad because they will result in virtually all labor and employment agency findings at whatever stage to be viewed as serious, repeated, willful, and/or pervasive. As a result, the respondents said the proposed definitions will overburden contractor responsibility determinations with irrelevant information, and will eliminate any cost savings contemplated by the Government.

Other respondents said the vagueness of the proposed definitions of "serious," "repeated," "willful," and "pervasive" found in FAR subpart 22.20 will lead to inconsistent, arbitrary, capricious and nontransparent results across the Government.

Response: The Councils do not agree that the definitions are overbroad or too vague. Rather, as defined in FAR subpart 22.20 and section III of the DOL Guidance, the criteria set forth for determining whether violations are serious, repeated, willful, and/or pervasive are fair, appropriate, and administrable. Many of the definitions provided in FAR subpart 22.20 and in section III of the DOL Guidance set out clear criteria that leave little room for ambiguity. However, in some instances, DOL has modified the criteria for increased clarity (see DOL Guidance, Section III.A., Preaward assessment and advice; DOL Guidance, Section III.A.1, Preaward assessment and advice—Classifying Labor Law violations; see also the Appendices to the DOL Guidance). DOL and ALCAs have or will develop the expertise necessary to classify and weigh the violations.

Comment: One respondent indicated that the DOL Guidance's definition of "administrative merits determination," combined with its definitions of "serious", "repeated", "willful", and "pervasive," will result in an agency always finding that there is a serious, repeated, willful, and/or pervasive violation, or some combination thereof. According to the respondent, this will lead to excessive and inconsistent ALCA assessments, as well as excessive costs for both Government agencies and contractors, because the definitions do not distinguish bad actors from the rest of the contractor community. For example, the respondent noted that because OSH Act violations are serious violations under the E.O. if the underlying citation was designated as serious by OSHA, a substantial majority of all OSHA citations would be classified as "serious violations." The respondent also criticized the DOL Guidance's classification of a violation as serious if it affects 25 percent of the workforce because, in the respondent's view, the 25 percent threshold is too low and lacks a reasonable minimum for smaller sites, and the term "worksite" should be more clearly defined such as in the Worker Adjustment and Retraining Notification (WARN) Act. Finally, the respondent indicated that it would be inefficient and costly for contractors to have to negotiate labor compliance agreements with multiple enforcement agencies.

Response: The rationale for requiring nonfinal administrative merits determinations to be reported has been explained in Section III.B.1.b. of this Preamble. Regarding the classification of violations under the E.O., the DOL Guidance's specific definitions of each of the terms "serious," "repeated," "willful," and "pervasive" make it clear that not all violations will meet these criteria. Moreover, even if a violation is classified as serious, repeated, willful, and/or pervasive, the ALCA will also consider any additional information that the contractor has provided, including mitigating circumstances and remedial measures.

Regarding the examples cited by the respondent, as to OSH Act violations, the DOL Guidance explicitly incorporated the OSH Act's definition of a serious violation to comply with Section 4(b)(i)(A) of the E.O., which requires incorporation of existing statutory standards for assessing whether a violation is serious, repeated, or willful. As to the 25 percent threshold, under the final DOL Guidance, this criterion has been narrowed so it applies only if there are at least 10 affected workers, thus avoiding triggering the 25 percent threshold when only a few workers are affected. Additionally, as explained below in Section III.B.13.c.ii., the definition of "worksite" in the DOL Guidance is already similar to the definition of "single site of employment" under WARN Act regulations.

Regarding the respondent's concerns about consistency, ALCAs will work closely with DOL during more complicated determinations, and DOL will be able to assist ALCAs in comparing a contractor's record with records that have in other cases resulted in advice that a labor compliance agreement is warranted, or that notification of the Suspending and Debarring Official is appropriate. Through its work with enforcement agencies, DOL also will provide assistance in analyzing whether remediation efforts are sufficient to bring contractors into compliance with labor laws and whether contractors have implemented programs or processes that will ensure future compliance in the course of performance of federal contracts. This level of coordination will ensure that ALCAs (and through them, contracting officers) receive guidance and structure.

Finally, the Councils anticipate that labor compliance agreements will be warranted in relatively infrequent circumstances. As such, the respondent's concerns about contractors having to negotiate numerous labor compliance agreements with multiple agencies will not likely be realized.

ii. Serious Violations

Comment: One respondent recommended revising the definition to remove any form of injunctive relief as a "serious violation."

Response: The Councils and DOL agree with the respondent, and DOL has modified the definition of "serious" in the Guidance accordingly. In the final Guidance, DOL removes injunctive relief from the list of criteria used to classify violations as serious, given that injunctions may include violations that do not necessarily bear on a contractor's integrity and business ethics. DOL has, however, added injunctive relief to the weighing section of its Guidance. Both preliminary and permanent injunctions imposed by courts are rare and require a showing of compelling circumstances, including irreparable harm to workers and a threat to the public interest. Thus, DOL determined that the imposition of injunctive relief for a serious, repeated, willful, and/or pervasive violation should give that violation additional weight against a finding that the contractor is responsible.

Comment: Respondents requested the definition of "serious" include any violation resulting in death, serious bodily injury, or assault.

Response: The Councils agree with DOL that a violation of any labor law should be serious when the violation causes or contributes to the death or serious injury of a worker. DOL has adopted this change in its final Guidance. The Councils agree with DOL that an assault would not necessarily render a violation serious; no change is made to the DOL final Guidance to that effect.

Comment: One respondent requested the definition of "serious," when based on a fine or other monetary penalty, be based on the final adjudicated value of the fine, and not the original assessment. According to one respondent, monetary penalties or back-wage assessments may be reduced for a variety of reasons, such as an employer demonstrating that it did not commit all or any of the alleged violations, or that the agency's calculations were erroneous. Additionally, the respondent stated that characterizing the reduced amount, which the agency agrees to and accepts, as a mitigating factor is not factually or legally sound. Respondent recommended that the final, reduced amount paid should be the only amount reported and considered because the original assessment is a flawed indication of the seriousness of the violation and cannot reasonably be used to measure the gravity of the violation or the contractor's integrity and business ethics.

Response: The E.O. explicitly instructs that "the amount of damages incurred or fines or penalties assessed with regard to the violation" be taken into account. Section 4(b)(i)(B)(1). The final DOL Guidance states that the thresholds are measured by the amount "due" instead of, as proposed, by the amount the enforcement agency "assessed." This means that if an enforcement agency consents to accept a reduced amount of either back wages or penalties for a violation, it is that lesser amount that will be used to determine seriousness. The Councils agree with DOL's determination that the "reduced amount" will be considered when determining whether a violation is serious. However, reliance on a lesser amount will not apply if an employer files for bankruptcy and cannot pay the full amount, or simply refuses to pay such that the full penalty is never collected. In such cases, the original assessed amount is the amount due, and therefore should be used when evaluating seriousness. (See DOL Preamble, section-by-section analysis, Section III.A.1.b.ii, Preaward assessment and advice-Fines, penalties, and back wages.) Finally, the Councils note that the respondent's concern about "reporting" the initial amount is unfounded; the disclosure provision in FAR 22.2004–2(b)(1)(i)(A)–(D) does not require contractors to disclose the amount of back wages assessed.

Comment: A respondent requested that the definition of "serious" include not only violations affecting 25 percent or more of the workforce at the site of the violation, but also any violations affecting 25 workers or more. Another respondent recommended that the "25 percent" threshold be lower to accurately reflect the impact that a serious violation may have on a workforce. By requiring that a full quarter of the workforce at any given worksite be affected by a violation in order for it to be considered "serious," these respondents stated that the threshold would fail to capture many serious violations that affect a smaller number of employees.

Response: As noted in the final DOL Guidance, DOL has declined to lower the threshold of affected workers from 25 percent. While any threshold will necessarily include some violations and exclude others, DOL believes that 25 percent is an appropriate benchmark for determining whether a violation affects a sufficient number of workers to be considered serious and thus warranting further review. DOL also has declined to add a threshold based on an absolute minimum number of workers; as DOL indicates, such a threshold would disproportionately affect larger employers. However, as to the 25 percent threshold, under the final DOL Guidance, this criterion has been narrowed so it applies only if there are at least 10 affected workers, thus avoiding triggering the 25 percent threshold when only a few workers are affected.

While recognizing the concerns of employee advocates that certain violations may fall short of the threshold, DOL notes that these violations may meet other criteria for seriousness.

Comment: One respondent requested that the definition of "serious" include any litigation involving "systemic" labor law violations.

Response: DOL determined not to expand the criterion of "systemic discrimination" to include other "systemic" labor law violations. "Systemic discrimination" has a well-established meaning under anti-discrimination laws and many widespread violations unrelated to discrimination will likely be classified as serious under other criteria in the DOL final Guidance. (See DOL Preamble, section-by-section analysis, Section III.A.1.b.vii, Preaward assessment and advice-Pattern or practice of discrimination or systemic discrimination.)

Comment: One respondent recommended revising the DOL Guidance with respect to findings that would "support" a conclusion that a contractor "interfered" with an agency's investigation for the purpose of determining whether a violation is serious under the E.O. The respondent asserted that: (1) The Guidance does not explain what it means by "support" such a finding; and (2) the Guidance would deprive contractors of rights to challenge scope of the agency's investigation.

Response: DOL has removed the language indicating that the findings in a labor law decision must "support a conclusion" that a contractor engaged in certain activities. In its place, DOL has clarified that the relevant criteria for classifying a violation as serious, repeated, willful, and/or pervasive must be readily ascertainable from factual findings or legal conclusions of the labor law decision itself. This means that ALCAs should not second-guess or re-litigate enforcement actions or the decisions of reviewing officials, courts, and arbitrators. It also means that a contractor will not be deemed to have interfered with an investigation based on a minimal or arguable showing. While ALCAs and contracting officers may seek additional information from the enforcement agencies to provide context, they should rely only on the information contained in the labor law decisions themselves to determine whether violations are serious, repeated, willful, and/or pervasive.

Additionally, the term "interference," when used to determine whether a violation is serious, has been narrowed in the final DOL Guidance to include a more limited set of circumstances. While DOL views interference with investigations as serious because such behavior severely hinders enforcement agencies' ability to conduct investigations and correct violations of law, DOL also recognizes that employers may have good-faith disputes with agencies about the scope or propriety of a request for documents or access to the worksite, and has accordingly narrowed the definition of "interference". The Councils agree with DOL's determinations on these issues.

Comment: A respondent proposed that the definition of "serious" violations should: (1) Include all workplace law violations that cause or contribute to the death and life-threatening injury of a worker; (2) clarify that the proposed dollar threshold for fines and penalties is cumulative across provisions violated and workers affected; and (3) stipulate that the 25 percent affected-worker threshold may be applied either to a single site of a company or on a cumulative basis across all of a company's worksites.

Response: As noted in the final DOL Guidance, DOL adopted the respondent's three suggestions with regard to the definition of serious violations.

Comment: One respondent suggested that the term "worksite" in the definition of "serious" was ambiguous when compared with the regulatory definition under the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. 2101–09. See 20 CFR 639.1–10.

Response: As noted in the DOL preamble, the definition of "worksite" in the proposed Guidance, which is largely unchanged in the final Guidance, is already similar to the definition of "single site of employment" under WARN Act regulations. Both definitions provide that: (1) A worksite can be a single building or a group of buildings in one campus or office park, but that separate buildings that are not in close proximity are separate worksites; and (2) for workers who do not have a fixed worksite, their worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. See 80 FR 30583, 20 CFR 639.3(i). These similarities support the conclusion that the definition of worksite in the DOL Guidance is appropriate.

Comment: One respondent recommended that DOL provide a more exhaustive definition of "serious" violations by:

1. Reducing the percentage of a workforce a violation must affect to trigger the serious designation;
2. Adding an alternative back wages threshold for wage and hour violations; and
3. Specifying that the designation applies to any labor law violation that causes or contributes to death or serious injury, or involves physical assault; and clarifying that a violation need not arise from a class action to support a determination of engagement in a pattern or practice of discrimination or systemic discrimination.

Response: DOL, in its final Guidance, declined to lower the threshold of affected workers from 25 percent. While any threshold will necessarily include some violations and exclude others, DOL believes that 25 percent is an appropriate benchmark for determining whether a violation affects a sufficient number of workers to be considered serious and thus warranting further review. Additionally, DOL declined to lower the back-wage threshold from $10,000 because it believes that this amount is appropriate.

DOL has clarified in the final Guidance that the $10,000 threshold is cumulative; *i.e.,* it can be satisfied by summing the back wages due to all affected employees. DOL believes that this will appropriately capture wage-and-hour violations that warrant additional scrutiny. Additionally, DOL, in its final Guidance, modified the definition of serious violations such that a violation of any labor law is serious when the violation causes or contributes to the death or serious injury of a worker. DOL has not, however, changed the Guidance to require that any case involving physical assault is a serious violation given that this term may include minor workplace altercations or interactions. Finally, DOL has clarified in the final Guidance that systemic discrimination is not limited to class actions.

iii. Repeated Violations

Comment: Some respondents requested that the definition of "repeated" include any violation of a law that happens five or more times in a three-year period.

Response: DOL made a determination not to adopt this suggestion. As DOL's final Guidance indicates, this suggestion is inconsistent with the E.O.'s specific direction that a determination of a repeated violation be based on "the same or a substantially similar requirement." However, DOL notes in its final Guidance that multiple violations that are not substantially similar to each other may be properly considered in an assessment of whether such violations constitute pervasive violations.

Comment: One respondent proposed that the definition of "repeated violation," which is in the new FAR 22.2002 and 52.222–59(a), include "the same or" between the existing "one or more additional labor violations of" and "substantially similar requirements."

The respondent rationalized that the phrase "the same or" is included in the DOL Guidance and would improve the brief definition of "repeated violation" being proposed for the FAR.

Response: The definition of "repeated violation" at FAR 22.2002 is revised to reflect the terminology "the same or a substantially similar."

iv. Willful Violations

Comment: A respondent proposed that the definition of a "willful" violation should be strengthened by allowing the reckless disregard or plain indifference standard of willfulness to apply to violations of all of the covered workplace laws—not just those for which no alternative statutory standard exists.

Response: As explained in DOL's final Guidance, DOL has declined to adopt this suggestion. The purpose of listing specific standards for the five laws that already incorporate a concept of willfulness is to further the efficient implementation of the E.O. The DOL Guidance states that for labor laws with an existing willfulness framework, violations are only willful under the E.O. if the relevant labor law decision explicitly includes such a finding. This reflects DOL's reasoning that it is inappropriate for ALCAs to second-guess the decision that a violation was willful, when an existing willfulness framework exists.

v. Pervasive Violations

Comment: One respondent expressed concern that the definition of "pervasive" lacked sufficient clarity. The respondent indicated that DOL has only identified a vague category of factors to measure/define "pervasive" which leave the contracting officers with no guidance or standards and thus leave it in the contracting officers' discretion to determine what is "pervasive."

Response: In DOL's view, the definition of pervasive violations must be a flexible one. Notwithstanding the utility of the definitions of serious, repeated, and willful violations, violations falling within these classifications may still vary significantly in their gravity, impact, and scope. Thus, in DOL's view, it would not be reasonable to require a finding of "pervasive" violations based on a set number or combination of these violations. Similarly, DOL declined to adopt rigid criteria that would mandate, for example, that any company of a certain size with at least a certain designated number of serious, repeated, or willful violations would be deemed to have pervasive violations. The Councils agree with these determinations.

d. Considering Mitigating Factors in Weighing Violations

Comment: One respondent commented that a contractor who has implemented a health and safety program must have in place more than just a "paper program" to be considered as having taken steps to mitigate past violations. The respondent requested that the definition of "mitigate" include the implementation of an effective compliance program and added that the contractor must have corrected the identified violations. The respondent also suggested that any contractor with repeat or pervasive violations should not be considered to have implemented a sufficient program.

Response: The Councils decline to adopt the suggested changes and DOL's final Guidance does not include any substantive changes to its discussion of mitigating factors. Concerns about "paper" compliance programs will be addressed through careful consideration of the totality of the circumstances—which may include the adequacy of a compliance program put forth as a mitigating factor. The Councils also decline to add a restriction that a contractor with repeated or pervasive OSHA violations may never be considered to have implemented a sufficient program or that such a program is required for mitigation. (See DOL Preamble, section-by-section analysis, Section III.B.1., Preaward assessment and advice—Mitigating factors that weigh in favor of a satisfactory record of Labor Law compliance.)

Comment: A respondent expressed concerns that DOL's limitation of remediation to those cases where any affected workers are made whole has generated some confusion, as in many cases, employers will choose to settle alleged violations even though the settlement does not pay affected workers with the full amount of back pay and other relief originally sought by the agency. Additionally, the respondent suggested that the proposed Guidance places special emphasis on remediation measures that go beyond the scope of the applicable law, such as enhanced settlement agreements that address remediation on an enterprise-wide level. Respondent recommended that in settlement cases involving alleged violations, affected workers are made whole even if they do not get full amount of back pay and other relief originally sought by the agency. Additionally, the respondent asserted that the provisions should not require that remediation efforts exceed the law's requirement in order to receive "full credit" for remediation.

Response: ALCAs are required to weigh, and contracting officers are required to consider, contractors' mitigating and remedial information in assessing contractors' disclosed labor law violations. ALCAs will not second-guess the remediation that has already been negotiated by enforcement agencies during a settlement agreement. A contractor's future-oriented measures that go beyond the minimum specifically required under the labor laws—whether voluntarily, through a settlement with an enforcement agency, or through a labor compliance agreement negotiated at the suggestion of an ALCA, are considered and contribute to a favorable finding regarding a contractor's record of labor law compliance. (See the DOL Guidance, section III.B.1.a. Mitigating factors that weigh in favor of a satisfactory record of Labor Law compliance, Remedial measures). This approach is consistent with the E.O.'s underlying goal of encouraging contractors to comply with labor laws while performing on Federal contracts.

Comment: A respondent recommended the following be included in the category of mitigating factors related to safety and health programs or grievance procedures that is in the proposed Guidance: (1) Participation in OSHA Voluntary Protection Programs, as the program encourages employee involvement and continuous improvement, similar to those industry consensus standards cited in the proposal; and (2) the final Guidance include reference to the International Organization for Standardization (ISO) 45001, which is a voluntary consensus standard for occupational health and safety management systems that is currently under development.

Response: ALCAs and contracting officers will take additional information about safety-and-health programs into consideration as part of their review of the totality of the circumstances. Employers who participate in such programs or have adopted safety and health management systems pursuant to recognized consensus standards are encouraged to include this information when they have an opportunity to provide relevant information, including regarding mitigating factors.

Comment: A respondent recommended more emphasis on safety and health programs, including ensuring the contractor enforces its own program, especially if a contractor wants to use a safety and health program as a mitigating factor. The respondent attached a copy of an OSHA Advisory Committee on Construction Safety and Health checklist for contracting officers to evaluate a program.

Response: The Councils thank the respondent for this information.

14. General and Miscellaneous Comments

a. Out of Scope of Proposed Rule

Comment: One respondent indicated that Government employees carrying out the mandates of these regulations should receive conspicuous notice of whistleblower protection as contracting officers, ALCAs (who are housed in contracting agencies), and other DOL personnel may face retaliation for failing to approve contracts even when serious labor law violations exist. Another respondent said employees of contractors and subcontractors and Government officials should be notified of the prohibition against retaliation and they should have effective remedies should retaliation occur.

Response: The E.O. does not provide for additional notifications of protection for whistleblowers. Whistleblower protection for contractor employees is already covered at FAR subpart 3.9. Whistleblower protection for Government employees is not covered in the FAR. The Councils note that contracting officers are given warrants; they are required to pay close attention to the requirements of law and are expected to be less susceptible to pressure than other Government employees. In addition, the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (known as the No Fear Act) requires that agencies provide annual notice to Federal employees, former Federal employees, and applicants for Federal employment of the rights and protections available under Federal antidiscrimination and whistleblower protection laws. Thus, no change to the final rule is warranted.

Comment: One respondent indicated that the Occupational Safety and Health (OSH) Act does not apply where another Federal agency has prescribed or enforced occupational safety and health standards. Under the authority of the 2002 National Defense Authorization Act's amendments to the Atomic Energy Act (AEA), 42 U.S.C. 2282c, Congress directed the Department of Energy to promulgate and enforce occupational safety and health standards for contractors working on Federally-owned nuclear facilities and laboratories operated by private employers. The E.O. does not expressly list the AEA among the statutes. However, scores of contractors and subcontractors regularly perform construction and large-scale maintenance work on Department of Energy worksites, under the AEA. The rule should cover the AEA.

Response: This is beyond the scope of the rule. The E.O.'s specific coverage did not include the AEA.

Comment: One respondent urged the FAR Council, for procurements that involve work with hazardous chemicals and/or hazardous work practices, add provisions to FAR 9.104–1 to require contracting officers to review the content of prospective contractors' safety and health programs before making a determination of responsibility. Best practices developed and published by industry in consensus standards and advocacy documents should be adopted by the FAR Council and placed in the final rule to aid contracting officers in evaluating prospective contractors' safety and health programs, especially when hazardous chemicals or hazardous work practices are involved.

Response: This is beyond the scope of the rule. The E.O.'s specific coverage concerns labor law violations and not the preventative measures envisioned by the respondent. However, contracting officers have the authority and ability to investigate and affirm the responsibility of contractors whose performance might involve hazardous chemicals and/or hazardous work practices.

Comment: One respondent indicated that the rule does not adequately address current DoD practices regarding business ethics. With respect to DoD contracts, this framework failed to acknowledge that the contractor purchasing system requirements already have clear requirements for the procurement of subcontract and supplier resources by DoD contractors.

Response: This comment is specific to DoD, and beyond the scope of the FAR rule which is a Governmentwide rule.

b. Extension Request

Comment: A number of respondents requested an extension beyond the initial 60 days. Some recommended that the FAR Council and DOL publish revised proposed rules in response to comments from affected persons, and delay implementation of any final rule until all affected persons have a meaningful opportunity to weigh in on all of the issues raised by the proposed rule and DOL Guidance.

Response: Two extensions were granted. The first extended the comment due date from July 27, 2015, to August 11, 2015 (80 FR 40968, July 14, 2015). The second extended the comment period from August 11, 2015, to August 26, 2015 (80 FR 46531, August 5, 2015).

Comment: One respondent opposed an extension because the respondent stated the President did not have the authority to issue the regulations.

Response: The President properly exercised his authority under 40 U.S.C. 121 and issued the E.O. directing the FAR Council to issue this regulation.

c. Miscellaneous

Comment: One respondent asserted that 41 U.S.C. 2313(g), part of the statute authorizing the FAPIIS database, should be used as the authority for the FAR rule, and that only some parts of the FAPIIS database need be publicly available.

Response: By statute, information in the FAPIIS database must be publicly available, except for past performance information. (41 U.S.C. 2313 Note).

Comment: A respondent stated that labor law enforcement is not a function the Federal Government should directly or indirectly transfer to its prime contractors through the acquisition process, especially since law enforcement is an inherently governmental function.

Response: As detailed in Section III.B.5 of this preamble, the Councils have adopted the alternative offered in the proposed rule for subcontractor disclosures whereby DOL assesses subcontractor violations. The contractor is still ultimately responsible for evaluating the subcontractor's compliance with labor laws as an element of responsibility. Determining subcontractor responsibility is not an inherently governmental function. There is no transfer of enforcement of the labor laws as a result of the rule; the rule provides information regarding compliance with labor laws to be considered during subcontract responsibility determinations and during subcontract performance.

Comment: A respondent theorized that a subcontractor could structure its bid to be under the $500,000 threshold, forcing the contractor to staff a project with several low-cost subcontractors instead of one that could most efficiently perform the work.

Response: Subcontractors are not forbidden from doing this. But for this to happen, multiple subcontractors would have to keep their bids under $500,000. Another subcontractor with an excellent labor law decision record might decide to bid over $500,000 and win more or all of the work. The intent of the E.O. is not to stifle competition, but to improve economy and efficiency by assuring that the Government contracts with responsible sources that will comply with labor laws; a subcontractor would be better off discussing its labor law decisions with DOL to try to improve its position. The Councils note that the E.O. exempts COTS subcontracts from the labor law decision disclosures (see FAR 52.222–58(b)).

Comment: A respondent recommended that contractor costs for implementing the E.O. should be specifically addressed as being allowable and allocable in the final rule.

Response: FAR cases do not normally revise FAR part 31 Cost Principles when new FAR coverage is added by the case. No revisions to the final rule are required.

Comment: The SBA Office of Advocacy commented that small businesses are concerned about how this rule impacts mergers, acquisitions and teaming agreements. Another respondent pointed out that during the due diligence phase of the merger/acquisition, companies would have to go back through at least three years of labor records in order to ensure that they are not purchasing a company with any violations, or alleged violations, which could impact the company formed as a conclusion of that deal. The respondent presumed that companies would steer clear of merging with or acquiring any company with violations on their record that could come back to haunt them in the future, potentially missing out on valuable innovation and development coming from companies with previous labor law violations and hindering deals that would otherwise result in positive developments for all parties involved. Another respondent warned that companies may seek to disavow prior labor law violation liability that could impact their present responsibility per this rule by spinning off companies whose sole purpose is to own the violations.

Response: Whichever legal entity is signing the contract is the one which discloses its own labor law decisions. The State law on corporations, not the FAR, will govern whether the legal entity signing the contract is the entity which owns a particular labor law violation.

The legal entity that is the offeror does not include a parent corporation, a subsidiary corporation, or other affiliates (see definition of affiliates in FAR 2.101). A corporate division is part of the corporation. Consistent with current FAR practice, representation and disclosures do not apply to a parent corporation, subsidiary corporation, or other affiliates, unless a specific FAR provision (*e.g.,* FAR 52.209–5) requires that additional information. Therefore, if XYZ Corporation is the legal entity whose name appears on the bid/offer, covered labor law decisions concerning labor law violations by XYZ Corporation at any location where that legal entity operates would need to be disclosed. The fact that XYZ Corporation is a subsidiary of XXX Corporation and the immediate parent of YYY Corporation does not change the scope of the required disclosure. Only XYZ Corporation's violations must be disclosed.

However, the Councils also note that the FAR does sometimes consider affiliates of an entity. Affiliates are defined in FAR 2.101(b) as associated business concerns or individuals if, directly or indirectly, (1) Either one controls or can control the other; or (2) A third party controls or can control both. Affiliates are considered, for example under small business size rules, under debarment and suspension, and sometimes under contracting officer responsibility considerations. See FAR 9.104–3(c), 9.406–3(b), and subpart 19.1. A final rule under FAR Case 2013–020, Information on Corporate Contractor Performance and Integrity, was published on March 7, 2016 (81 FR 11988); it implemented section 852 of the NDAA for FY 2013, giving more information for a contracting officer to consider about an immediate owner, predecessor, or subsidiary.

Comment: Two respondents alleged that current staffing at the GAO is insufficient to manage the expected increase in the number of protests as a result of adverse or delayed responsibility determinations under this rule. Insufficient GAO resources would mean additional delays since a bid protest at the GAO automatically stays the performance of a contract.

Response: Staffing at GAO, an agency in the legislative branch, is beyond the scope of the FAR rule, which covers executive branch agencies.

Comment: A respondent theorized that there would be increased bid protests alleging favoritism, *e.g.,* that a protester was passed over for a bid in place of an entity the protester believes has a similar record of labor law violations.

Response: "Being passed over for contract award" describes a source selection evaluation. The labor law violation assessment is a matter of responsibility, which occurs separate from the evaluation.

Comment: A respondent stated that the rule expands the grounds for a sustainable protest, including for reasons of *de facto* debarment resulting from a nonresponsibility determination, use of a competitor's alleged noncompliance for a competitive advantage, and many other potential scenarios.

Response: One finding of nonresponsibility is not a *de facto* debarment, but multiple findings of nonresponsibility based on the same facts may constitute an improper *de facto* debarment. Contracting officers will work with ALCAs, and when appropriate, notify their agency suspending and debarring officials, using the procedures at FAR subpart 9.4 as the proper means of excluding a firm from Government contracting. Both ALCAs and the suspending and debarring officials will coordinate actions within an agency and across the Government, as a further protection. The contracting officer and the ALCA will each be exercising their own independent judgment in each case. The Councils do not see that the rule will expand the grounds for protests. The ALCA will be documenting his/her analysis and advice, and the contracting officer will be documenting how the ALCA analysis was considered. (See also discussion at Section III.B.1.b. above.)

Comment: A respondent warned that a death spiral could occur for a contractor after a nonresponsibility determination from a single labor law "violation" in a single transactional process, and so bid protests could increase as a matter of company survival.

Response: The E.O. states that, in most cases, a single violation will not lead to a finding of nonresponsibility.

The intent of the E.O. is to improve efficiency by assuring contractors' compliance with labor laws while performing Federal contracts, not to decrease competition or increase bid protests. The DOL Guidance at section III.B.2.c. lists four examples of violations of particular gravity:

> Violations related to the death of an employee; violations involving a termination of employment for exercising a right protected under the Labor Laws; violations that detrimentally impact the working conditions of all or nearly all of the workforce at a worksite; and violations where the amount of back wages, penalties, and other damages awarded is greater than $100,000.

Even a violation of particular gravity is not an automatic bar; the ALCA and contracting officer will consider mitigating factors and remedial measures (see FAR 22.2004–2(b)).

Comment: Respondents alleged that the rule will open the way to many more bid protests. Even if a competitor would otherwise have no basis to challenge an award, publicly available information would provide them with a road map to protest. Information regarding any reported violation would be made available in FAPIIS. An unsuccessful offeror could raise as a challenge to the procurement decision the agency's failure to properly consider the responsibility of that awardee in light of the violation. Although the record of the ALCA and contracting officer's consideration of the matter would, in many instances, lead to the denial of this protest ground, this resolution could not be accomplished without completion of the full protest adjudication process—100 days at GAO and potentially longer if brought at the Court of Federal Claims.

Response: It is undetermined whether and how much of an increase in bid protests will occur as a direct result of this rule. A long-standing tenet of Federal procurement is that the responsibility determination is solely the contracting officer's duty and discretion. When reviewing a bid protest based on responsibility grounds, GAO gives great deference to a contracting officer's decision. Although some disclosed information associated with this rule will be made publicly available in FAPIIS, potential protesters will not have insight into how the ALCA assessed, and the contracting officer considered the labor law violation information, nor into how a contractor's record of labor law compliance factored into the contracting officer's overall responsibility determination, which considers the totality of circumstances for the particular procurement.

Comment: Respondents noted that bid protests may result in long delays in the procurement process, and that protests at GAO may result in automatic stays.

Response: While bid protests can cause delays in the procurement process, the Government considers them valuable in preserving fairness, integrity, and ethics in the procurement process.

Comment: Respondents noted that small businesses can appeal nonresponsibility determinations at SBA. The contracting officer can only refer one matter at a time for a single acquisition to the SBA. Thus, if multiple small businesses are being considered for an award and such questions are raised, the SBA would be required to consider each of these matters in turn. In the interim, no award could issue for a period of at least 15 business days following receipt of a referral.

Response: The Councils acknowledge that the Certificate of Competency process can add time to the procurement process.

Comment: A respondent alleged that the rule would have broad impact on the construction industry, as few construction contracts are below the $500,000 threshold. The respondent indicated that the procedures will be an encumbrance on the procurement process, especially since violations on nonGovernment contracts are to be disclosed.

Response: The Councils acknowledge that the E.O. was intended to have a broad scope. The final rule disclosures will have a phase-in threshold for solicitations and contracts of $50 million for October 25, 2016, through April 24, 2017, dropping to $500,000 thereafter.

Comment: A respondent stated that the responsibility process, already expanded by many other new preaward compliance checks aimed at tax delinquency, human trafficking, and counterfeit parts, just to name a few, will become its own distinct procurement process aimed at enforcing laws not related to contract performance, rather than a last due diligence step as prescribed by FAR part 9.

Response: The responsibility process requires the contractor have a satisfactory record of integrity and business ethics. See 9.104–1(d). The E.O. properly instructs contracting officers to consider whether a contractor's labor law compliance may affect its record of integrity and business ethics.

d. General Support for the Rule

Comment: Many respondents expressed some support for the proposed rule. Among the numerous reasons cited were that: Federal contractors that commit labor law violations harm their workers and cost taxpayers money; the American people deserve to be assured that their Federal tax dollars are not being used to subsidize violations of the employment rights of workers, and that high-road employers are not placed at a competitive disadvantage; the E.O. and the proposed rules are critical to closing gaps in the Federal Government's system for ensuring that contractors that do business with the Federal Government abide by labor laws; and the fact that the proposed regulation and DOL's Guidance offer putative contractors compliance assistance shows that this is not a punitive "blackballing" system, but rather one aimed at proactively assisting contractors in improving and maintaining compliant labor policies and practices.

Response: The Councils appreciate the support for the rule and E.O.

e. General Opposition to the Rule

Comment: Many respondents expressed some opposition to the proposed rule. Some recommended withdrawal of the proposed rule. Among the comments and reasons cited were:

—The E.O., the proposed rule, and DOL Guidance fail to demonstrate an actual need for this new rule and process. The proposed rule acknowledges that "the vast majority of Federal contractors play by the rules." As a result, the proposed rule and Guidance are a solution in search of a problem;

—The FAR Council has not adequately assessed the impacts or seriously examined the potential for unintended consequences and other harmful effects of this rule on the Government mission, the vendor community, and the Federal marketplace and costs to the taxpayer directly resulting from compliance with the new rule. The FAR Council should withdraw the proposed rule until it concludes that the benefits of the intended regulation justify the costs. Further study and analysis is needed to demonstrate that the E.O.'s goals are attainable, and whether they might be achieved through less-costly modifications to existing regulatory regimes;

—The E.O., FAR rule, and DOL Guidance violate statutes and/or the Constitution.

—The E.O. improperly usurps existing enforcement regimes at the expense of due process. The existing suspension and debarment structure, and the FAPIIS clauses, are sufficient to address the matter of unscrupulous contractors. The Office of Federal Contractor Compliance Programs already reviews contractors' compliance with affirmative action employment practices.

—The implementation of the rule as it relates to safety and health violations would add no constructive value to existing law and structures.

Response: Noted. Many of these comments are described in more detail elsewhere in this Preamble (see Section III.B.1.) and in the DOL Preamble. The Councils are implementing the E.O.

IV. Executive Orders 12866 and 13563

A. Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is a major rule under 5 U.S.C. 804.

B. A Regulatory Impact Analysis (RIA) that includes a detailed discussion and explanation about the assumptions and methodology used to estimate the cost of this regulatory action is available at *https://www.regulations.gov/.* A summary of the RIA follows.

The RIA was developed as a joint product by DoD, GSA, and NASA along with DOL in its capacity as the lead program agency for implementing this Executive Order. Many of the estimates and much of the supporting analysis were developed in cooperation with DOL and rely to a significant extent on input provided by DOL. The RIA contains comprehensive discussion of the many public comments received and was revised as a result of careful consideration of public comment to better reflect estimates of burden and cost associated with this regulatory approach. The final RIA was adjusted in the following areas following careful consideration of public comments—(1) stratification of the contractor and subcontractor population when estimating costs for key compliance areas (*e.g.,* reporting and disclosure, semiannual updates) to reflect the size of contractors most impacted by this rule, (2) increase of burden hours for familiarization with the regulation, (3) adjustment to the labor burden hours for compliance, (4) inclusion of tracking mechanism costs (*e.g.,* software upgrades to include this compliance functionality), and (5) recognition of contractor and subcontractor overhead associated with this rule. Quantified cost estimates are presented where feasible and presented in a qualitative manner when not feasible. The analysis covers 10 years to ensure it captures the key benefits and costs of this regulatory action and considers the phase in periods of the disclosure and paycheck transparency requirements.

The RIA presents a subject-by-subject analysis of the benefits and costs of the final rule, followed by a summary of these benefits and costs, including the total benefits and costs over the 10-year period of analysis. The subject-by-subject analysis sections of the RIA provide comprehensive and detailed discussion of the estimating methodologies used.

Number of Prime Contract Awards and Unique Contractors

In estimating the number of contract awards over $500,000 subject to the rule, three years of FPDS data, from FY2012 to FY2014, was utilized to arrive at an estimate of 26,757 prime contract awards per fiscal year. The estimating methodology for prime contractors and subcontractors was revised. The most significant revision in methodology was in aligning the population of affected contractors with the legal entity making the offer, which is the scope of the reporting burden. The final rule uses Tax Identification Numbers (TIN), rather than the DUNS number, to identify unique prime contractors that will be impacted by this rule. The unique subcontractor population was determined using a methodology that assumes the subcontractor population is a factor of the unique prime contractor population. Again taking an average over the three fiscal years, the agencies estimate that there are on average 13,866 unique contractors who receive awards valued at or over $500,000 each fiscal year.

Number of Subcontract Awards and Unique Subcontractors

The unique subcontractor population was determined using a methodology that assumes the subcontractor population is a factor of the unique prime contractor population. Specifically, that each unique prime contractor has three subcontractors with awards valued at or over $500,000 (across all tiers) with further adjustments, for example, for duplication of subcontractors who also perform as prime contractors. The number of unique subcontractors subject to the rule is estimated at 10,317. It was assumed that, on average, subcontractors receive four awards valued at or above $500,000 each year for an average 41,268 subcontract awards subject to the rule.

Adjusting the Annual Number of Unique Contractors and Subcontractors for Repeat Recipients of Awards

The analysis identifies, for years 2 through 10, what share of affected contractors and subcontractors would likely receive an award for the first time under the new requirements. This was done in order to eliminate double counting certain burdens, such as regulatory familiarization costs.

Hourly Compensation Rates

For Federal employees, the agencies are using the mid-range of the GS–13, GS–14, and GS–15 wage rates from the GS salary table adjusted for the locality pay area of Washington-Baltimore-Northern Virginia. For private sector employees, a source which more closely reflects private sector compensation is used: Median wage rates from the Bureau of Labor Statistics' Occupational Employment Statistics (OES) program. The agencies adjusted these wage rates using a loaded wage factor to reflect total compensation, which includes health insurance and retirement benefits. The loaded wage factor for private sector employees is 1.44, and the loaded wage factor for federal employees is 1.63. (See RIA Exhibit 2: Calculation of Hourly Compensation Rates).

The final RIA contains a lengthy qualitative discussion that considers inclusion of overhead and how overhead has been treated in a number of recent regulatory actions. The RIA, in footnote 21, applies a 17% overhead rate, which is a rate utilized by EPA in recent rules, as example to demonstrate the affect overhead might have on the estimate for this regulatory action.

Time To Review the Final Rule

The RIA recognizes that eight hours would not be sufficient for a large contractor to review and understand the rule. The agencies also recognize that some large and small employers without in-house labor law expertise would need participation and advice from a labor attorney, as stated in the public comments. Therefore, the estimate for the amount of time it will take employers to become familiar with the rule has been revised accordingly. Based in part on FPDS data, the signatory agencies and DOL estimate that 55 percent of federal contractors are small businesses that would need 8 hours by a general manager and 4 hours by a labor attorney, while 45 percent of federal contractors that are not small businesses would need 14 hours by a general manager and 8 hours by a labor attorney.

Costs of the Disclosure Requirements

Cost Methodology

To determine the impact of the disclosure requirements the following steps were taken:

1. Estimate the population of affected contractors and subcontractors.
2. Estimate the number of initial responses disclosing information related to labor law violations, and supporting documentation.
3. Estimate the number of hours and the associated costs of completing those responses.
4. Estimate the number of workers who would receive status notices, along with the number of hours and the associated costs of completing the recurring status notices.
5. Estimate the cost of producing and disseminating required wage statements.
6. Consider the potential cost of increased litigation due to the E.O.'s provision prohibiting certain contractors from requiring their workers to sign mandatory-arbitration agreements.

The estimated representation costs include the time and effort it will take federal contractors and subcontractors to search for relevant documents, review and approve the release of the information, and disclose the information. The estimates assume that not all efforts (*e.g.*, retrieving and keeping records) are attributed solely to the purpose of complying with the disclosure requirements of the Order; only those actions that are not customary to normal business operations are attributed to this estimate.

Population of Contractors and Subcontractors With Labor and Employment Violations

The estimating methodology for the percent of likely violators has been revised to use a randomly selected statistically representative sample of 400 Federal contractors with at least one award over $500,000 from FY 2013 FPDS. The estimated percent of Federal contractors and subcontractors that will have labor law decisions subject to disclosure has been revised from 4.05 percent in the proposed RIA to 9.67 percent in the final RIA.

Cost of Contractor and Subcontractor Representation Regarding Compliance With Labor Laws

The amount of time required for personnel to research files containing compliance and litigation history information, determine whether to report that it has or has not had a covered violation at the initial representation stage, and to identify any additional information that may be submitted if in fact it has a covered violation will vary depending on the complexity of any given case. In some instances, where the violation history of a particular case is more elaborate, compiling supporting documentation to demonstrate mitigating factors may require significant resources and time. In other cases, where one violation or a few violations are reported or where there is little to no supporting information to show mitigating factors, this step could take virtually no time. The estimate assumes 25 hours are required for the first time a contractor or subcontractor conducts a full reporting period response and 4 hours for subsequent responses.

Cost of Contractor Review of Subcontractor Information

The analysis expects that prime contractors will incur costs for reviewing the information submitted by prospective subcontractors. Where a prospective subcontractor responded that it has a covered violation and DOL requests additional information, DOL will review materials submitted by the subcontractor and notify the contractor of DOL's recommendation. An estimated 80 percent of prospective subcontractors with violations will agree with DOL's recommendation, so it is estimated that prime contractors will only expend about 30 minutes to review DOL's recommendation. For the other 20 percent of prospective subcontractors with violations, if a prospective subcontractor does not agree with DOL's recommendation and requests review by a prime contractor or if DOL has not completed its review within three days, then the prime contractor will expend an estimated 31.0 hours to consider the information submitted by a prospective subcontractor. Therefore, the weighted average time for prime contractors to review information submitted by prospective subcontractors with violations is estimated to be 6.6 hours (= 80% × 0.5 hours + 20% × 31.0 hours).

Cost of Semiannual Updates Regarding Compliance With Labor Laws

In determining whether updated information needs to be provided, the estimate recognizes that identifying information at this stage would be part of an established process and is for a greatly reduced timeframe (*i.e.,* six months or less versus 36 months for the initial representation), therefore 4 hours is estimated for a management level employee. It is estimated that the task of input and transmission of the updated information identified will take a legal support worker 2 hours.

Lastly, contractors may need or want to review and analyze the updated information submitted by subcontractors to determine whether any additional action is warranted. The estimate considers that 80 percent of subcontractors with violations will agree with DOL's recommendation, so prime contractors will only expend about 30 minutes to review DOL's recommendation. For the other 20 percent of subcontractors with violations, if a subcontractor does not agree with DOL's recommendation and requests review by a prime contractor or if DOL has not completed its review within three days, then the prime contractor will expend an estimated 3.6 hours to consider the updated information submitted by a subcontractor. The 3.6 hour estimate is derived from the estimated 2 hours that is used in the Government Costs section to estimate contracting agency evaluations of prospective contractor information, with an upward adjustment to account for added reporting when contractors decide to continue the subcontracts of subcontractors after having been informed that the subcontractor has not entered into a labor compliance agreement within a reasonable period or is not meeting the terms of the agreement. Therefore, the estimated time for a manager to review the updated information provided by a subcontractor is 1.12 hours (= 80% × 0.5 hour + 20% × 3.6 hours).

Cost of Developing and Maintaining a System for Tracking Violations

The final rule acknowledges that some contractors may choose to utilize tracking mechanisms in order to more easily: (1) Identify labor violations; (2) determine which violations are reportable; (3) disclose information to the contracting officer when a responsibility determination is being made; (4) provide to the contracting officer additional information to demonstrate responsibility; and (5) provide required semi-annual updates. A tracking system could be a mechanism such as software, added functionality to an existing system, or establishing a new system. Regardless of whether a contractor has had labor violations or is likely to have any in the future the analysis recognizes that prudent contractors and subcontractors may establish a tracking mechanism with the appropriate depth and breadth that, in their business judgment, is necessary to demonstrate compliance.

Startup Costs

The analysis stratifies contractors by organizational complexity level relative to company size small, medium, large, and the top one percent of federal contractors. FPDS categorizes businesses as either "small" or "other than small." As already discussed, analysis estimates that 55 percent of Federal contractors are small businesses. Within the "other than small" category, there are varying organizational sizes and complexities, therefore, for purposes of this estimate, the agencies have attributed 35 percent of other than small businesses in FPDS to medium organizations, and 10 percent to large businesses, further breaking out the top one percent representing the very largest businesses. Subcontractors were not stratified by organizational complexity because Federal procurement data do not include information about subcontractor size; therefore, the total subcontractor estimate remains 10,317.

Illustrative estimates of system development costs for contractors within the four complexity categories are presented. The cost estimates reflect the tasks associated with identifying the requirements for a tracking system, developing the system, giving access to the system, and providing training on the system.

Maintenance Costs

Once tracking systems are in place, ongoing maintenance costs may accrue. To account for these maintenance costs, the analysis considered a range from 10 percent to 20 percent of the initial cost of establishing the tracking system. The estimate of annual maintenance costs is based on the size of the organization, with smaller contractors incurring higher costs as a percentage of their initial system costs. The annual maintenance costs are estimated as follows: 20 percent of startup costs for small contractors; 15 percent of startup costs for medium-sized contractors; 10 percent of startup costs for large contractors; 10 percent of startup costs for the very largest contractors; and 15 percent of startup costs for subcontractors.

Sensitivity Analysis

The cost estimates for tracking systems are the function of primarily two assumptions: (1) The type of system each firm size category will need to develop, and (2) the average cost to develop a given tracking system. A sensitivity analysis presents what the estimated total tracking system costs would be if these two assumptions were altered (see RIA Exhibits 6 and 7).

Government Costs

The analysis includes estimates for five categories of costs to the federal government directly related to the implementation of the Order: (1) New staff at DOL; (2) new Agency Labor Compliance Advisors (ALCAs) at other federal agencies; (3) contracting agency evaluation costs; (4) information technology costs to support implementation of the Order; and (5) government personnel training costs.

Costs of the Paycheck Transparency Provision

Cost Methodology

The final rule's paycheck transparency clause contain a requirement for contractors and subcontractors to provide two documents to workers on such contracts for whom they are required to maintain wage records under the FLSA, the DBA, the SCA, or equivalent state laws. First, contractors and subcontractors will provide a notice to each worker whom they treat as an independent contractor informing the worker of his/her independent contractor status. Second, contractors and subcontractors will provide a wage statement to each worker in each pay period. The wage statement need not contain a record of hours worked if the contractor or subcontractor has informed the worker that he/she is exempt from the FLSA's overtime requirements, so contractors and subcontractors may elect to provide additional notices to their exempt employees informing them of their FLSA exempt status. The analysis of costs for the paycheck transparency requirements include estimates for—

- Number of Independent Contractor Status Notices.
- Number of FLSA Status Notices.
- Total Number of Status Notices.
- Cost of Implementation of Status Notices.
- Cost of Status Notices in Year One.
- Cost of Recurring Status Notices.
- Generation and Distribution of Wage Statements.

Total Quantifiable Costs

Exhibit 8, which is reproduced below, presents a summary of the first-year, second-year, and annualized quantifiable costs final rule disclosure and paycheck transparency requirements to contractors and subcontractors, as well as the estimated government costs. Exhibit 8 includes both the first-year and second-year impacts because the Final Rule's requirement for contractors and subcontractors to report labor law violations will be phased in over three years.

EXHIBIT 8—SUMMARY OF QUANTIFIABLE COSTS

	Entity affected	Monetized year 1 costs	Monetized year 2 costs	Annualized costs	
				3% Discounting	7% Discounting
Time to Review the Order	Contractors and Subcontractors.	$126,918,776	$76,912,778	$57,154,219	$59,743,450
Offeror Initial Representation	Contractors	25,046,077	63,945,154	59,460,088	59,187,405
	Subcontractors	0	86,105,338	70,900,398	69,982,912
Offeror Additional Information	Contractors	17,921	130,666	233,556	226,447
	Subcontractors	0	201,529	357,073	345,577
Contractor Review of Subcontractor Information.	Contractors	0	1,268,066	2,352,118	2,275,288
Update Determination	Contractors	0	2,026,028	6,237,564	5,905,436
	Subcontractors	0	0	4,145,008	3,867,284
Providing Additional Information	Contractors	0	8,146	25,105	23,768
	Subcontractors	0	0	16,684	15,566
Contractor Considers Subcontractors' Updated Information.	Contractors	0	0	18,705	17,452
Tracking System Costs	Contractors and Subcontractors.	291,052,560	172,493,936	187,486,027	189,038,901
Status Notice Implementation	Contractors and Subcontractors.	1,569,801	0	178,669	208,883
Issuing First and Recurring Status Notices.	Contractors and Subcontractors.	2,388,669	1,283,828	1,409,577	1,430,842
Update of Payroll Systems	Contractors and Subcontractors.	5,079,547	3,078,206	2,287,428	2,391,054
Wage Statement Distribution	Contractors and Subcontractors.	6,279,598	6,279,598	6,279,598	6,279,598
Total Employer Costs		458,352,949	413,733,272	398,541,816	400,939,861
Government Costs		15,772,150	10,129,299	10,944,157	11,091,474
Total Costs (Employer + Government).		474,075,099	423,862,572	409,535,973	412,031,335

Note: Totals may not sum due to rounding.

See RIA Exhibit 9, Summary of Monetized Costs, for a summary of the cost analysis of the final rule. The monetized costs displayed are the yearly summations of the calculations already described.

Cost of Complaint and Dispute Transparency Provision

The final rule contains a clause that prohibits contractors and subcontractors with Federal contracts exceeding $1 million from requiring employees to arbitrate certain discrimination and harassment claims. Specifically, the Order provides that the decision to arbitrate claims under Title VII of the Civil Rights Act of 1964 and sexual harassment or sexual assault tort claims may only be made with the voluntary consent of the employee or independent contractor after such a dispute arises. The analysis presents a discussion of the impacts of this prohibition in terms of a presumption that as a result of this provision more workers will seek to litigate such claims in court as opposed to raising them through arbitration. A quantified analysis was not feasible as the agencies were unable to obtain empirical data that would allow them to quantify the provision's overall cost because the potential increase in the number of claimants that would elect to go to trial as a result of this prohibition is unknown.

Benefits, Transfer Impacts, and Accompanying Costs of Disclosing Labor Law Violations

In the final analysis, as in the proposed analysis, there were insufficient data to accurately quantify the benefits presented. The agencies invited respondents to provide data that would allow for more thorough benefit estimations, however no data were received that could be used to quantify the benefits of the final rule. The agencies have extensively discussed the benefits and showed relevant peer-reviewed studies and other published reports that often quantitatively demonstrate that fair pay and safe workplaces would lead to improved contractor performance, fewer injuries and fatalities, reduced employment discrimination, less absenteeism, and higher productivity at work. Extensive discussion is presented on the following—

- Improved Contractor Performance
- Safer Workplaces
- Reduced Employment Discrimination
- Fairer Wages
- Enforcement Cost Savings and Transfer Impacts for the Government, Contractors, and Society
- Transfer Impacts of the Paycheck Transparency Provision
- Non-Quantified Impacts of the Paycheck Transparency Provision
- Benefits and Transfer Impacts of Complaint and Dispute Transparency Provision

Discussion of Regulatory Alternatives

The E.O. and the Final Rule are designed to reduce the likelihood that taxpayers will be subject to poor performance on Federal contracts and preventing taxpayer dollars from rewarding corporations that break the law. A series of alternative regulatory approaches were examined including—

1. Require contracting officers to consider prospective contractors' labor compliance without the assistance of ALCAs, and without disclosure by contractors of their labor law decisions. This alternative was rejected because the E.O. provided for contractor disclosure and for ALCAs to assist contracting officers because these tools are deemed necessary for contracting officers to effectively consider a prospective contractor's labor compliance. Without timely disclosures or the support and expert advice of ALCAs, it is unrealistic to expect a consistent approach to the assessment of labor violation information provided to contracting officers for their consideration during responsibility determinations and during contract performance.

2. Remove the requirement that prospective contractors disclose their labor violations while leaving the rest of the final rule implementation of the E.O. intact. This could be an attractive alternative if a contracting agency's ALCA had access to a database that would provide all of a prospective contractor's labor law decisions as required by the E.O. and implementing regulation. However even if a current system had efficient access to all enforcement agency information, *e.g.* administrative merits determinations, and all publicly available information, it would still not have access to all labor law decisions required by the E.O. and implementing regulation, *e.g.,* privately conducted arbitration decisions and all civil judgments. OMB, GSA, and other Federal agencies are working on systems that will improve the availability of relevant data in the longer term, however for implementation of the final rule, this alternative has been rejected.

3. Require all contractors for which a responsibility determination is undertaken to provide the following nine categories of information regarding their labor violations:

a. The labor law that was violated;

b. The case number, inspection number, charge number, docket number, or other unique identification number;

c. The date that the determination, judgment, award, or decision was rendered;

d. The name of the court, arbitrator(s), agency, board, or commission that rendered it;

e. The name of the case, arbitration, or proceeding, if applicable;

f. The street address of the worksite where the violation took place (or if the violation took place in multiple worksites, then the address of each worksite);

g. Whether the proceeding was ongoing or closed;

h. Whether there was a settlement, compliance, or remediation agreement related to the violation; and

i. The amount(s) of any penalties or fines assessed and any back wages due as a result of the violation.

This approach would make the process of considering labor violations more efficient from the perspective of contracting agencies because more information would immediately be available to ALCAs and contracting officers without the necessity of gathering it. However, it was rejected in favor of a narrowed list of four data elements of information in order to reduce the burden on contractors while still providing the minimally necessary information to achieve the desired regulatory outcome.

4. Another alternative would be to have all prospective contractors bidding on contracts valued at greater than $500,000—not just those for which a contracting officer undertakes a responsibility determination—disclose the information. This alternative was rejected because it would increase the burden on contractors and it was determined that the approach taken in the final rule of a more narrowly tailored requirement would retain the rule's effectiveness relative to the objectives of the E.O. while minimizing the burden on contractors.

5. With regard to the Order's and Final Rule's provisions regarding subcontractors, one alternative would be to simply exempt subcontractors from any obligations under the Order and focus only on prime contractors' records of labor compliance. This alternative would eliminate any burden on subcontractors. It would also reduce the burden on contractors associated with evaluating their prospective subcontractors' labor compliance histories. This alternative was rejected because contractors are already required to evaluate their prospective subcontractors' integrity and business ethics, when determining subcontractor responsibility and disregarding subcontractors' labor compliance in making that determination would undermine the core objective of the E.O.

6. Similarly, the Order's requirements could be limited to first-tier subcontractors. This alternative was rejected because similar to the previous alternative, this alternative would also undermine the core goals of the E.O., given that a significant portion of the work on Federal contracts is performed by subcontractors below the first tier.

V. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows—

The final regulatory flexibility analysis contains six discrete types of information, consistent with 5 U.S.C. 604. The FRFA coverage of these elements is summarized below.

1. Rule objectives. The FRFA summarizes E.O. 13673's requirement for the FAR Council to develop Fair Pay and Safe Workplace regulations, identifies the objective of promoting economy and efficient in procurement by awarding contracts to contractors that comply with labor laws; and provides an overview of the final rule's main requirements.

2. Significant IRFA issues raised by the public. The FRFA identifies six issues that the public raised as shortcomings with the IRFA—

- The Government did not articulate a rational basis for the rule promulgation,
- The Government did not sufficiently explore alternatives to the rule,
- The rule conflicts with suspension and debarment procedures,
- The applicability threshold will not help minimize impact to small businesses,
- The compliance burden on small businesses was not addressed in relevant terms, and
- The data source for subcontractors was problematic.

The FRFA includes the Government's assessment of each issue and identifies an associated disposition.

3. Disposition of comments from the Chief Counsel for Advocacy of the Small Business Administration (SBA). The FRFA identifies 14 comments raised by the Chief Counsel for Advocacy of the Small Business Administration. Specifically, the Chief Counsel for Advocacy of the SBA's comments reflected concerns about DOL Guidance, the proposed FAR rule, and the associated burden estimate, including: (1) Calculation of small business entities, (2) increased costs of compliance, (3) burdens of the disclosure process, (4) impact on small business subcontractors, (5) handling by primes of subcontractor proprietary information, (6) insufficient processing time for ALCAs to assess information, (7) inability to track subcontractor law violations, (8) lack of clarity on the rule's impact to the Certificate of Competency process, (9) underestimate of affected entities, (10) underestimate of public cost, (11) non-inclusion of all RIA costs in the IRFA, (12) lack of using the rulemaking process to publish the DOL Guidance, (13) lack of due process in disclosing a violation before final adjudication, and (14) negative impact on mergers, acquisitions, and teaming agreements. The FRFA includes the Government's assessment of each issue and identifies an associated disposition.

4. Impact to small entities. The FRFA estimates that 17,943 small businesses (7,626 prime contractors and 10,317 subcontractors) will be impacted by the rule's requirements, noting that this rule will impact all small entities who propose as contractors or subcontractors on solicitations and resultant contracts estimated to exceed $500,000. The number of impacted small entities is derived by estimating a total of 24,183 impacted contractors (13,866 prime contractors and 10,317 subcontractors), then deducing the number of impacted small businesses (7,626 prime contractors and 10,317 subcontractors). The RIA section A, Contractor and Subcontractor Populations, provides detailed information.

5. Estimated compliance requirements. The FRFA reviews the reporting and disclosure requirements of two FAR provisions, 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673) and 52.222–58, Subcontractor Responsibility Regarding Compliance with Labor Laws (Executive Order 13673). It also reviews the compliance requirements of associated clauses. The FRFA includes an Exhibit from the RIA that outlines overall employer costs of $458,352,949, in year one, which account for 12 compliance activities (review the E.O., make an initial representation, provide additional information, review subcontractor information, update the determination, provide Additional Information, consider subcontractors' updated Information, establish a tracking system, implement a status notice, issue status notices, update payroll systems, and distribute wage statements). The FRFA notes that Exhibit 8 is a summary of overall costs; not those specific to small businesses.

6. Steps to minimize impact on small entities. The FRFA indicates that the Councils have taken several actions to minimize burden for contractors and subcontractors, small and large, in response to the public comments and those of SBA's Office of Advocacy. Among the steps taken are:

- The disclosure reporting period is phased in to provide the time affected parties may need to familiarize themselves with the rule, set up internal protocols, and create or modify internal databases.
- Subcontractor disclosure of labor law decisions (the decisions, mitigating factors and remedial measures) is made directly to DOL for review and assessment instead of to the prime contractor.
- Public disclosure is limited to four basic pieces of labor law decision information; the final rule does not compel public disclosure of additional documents demonstrating mitigating factors, remedial measures, and other compliance steps.
- The availability and consideration of existing remedies, such as documenting noncompliance in past performance, over more severe remedies (*e.g.,* termination) is emphasized; and early engagement with DOL is encouraged.

The FRFA also identifies other significant alternatives to the rule that were considered, which affect the impact on small entities, and why each was rejected.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies. The rule contains information collection requirements. OMB has cleared this information collection requirement under OMB Control Number 9000–0195, titled: Fair Pay and Safe Workplaces. The PRA supporting statement is summarized as follows—

The PRA supporting statement provides a description of the requirements of the rule that contain information collection requirements and indicates that they are contained in two solicitation provisions and two contract clauses.

- Provision 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673) (which is repeated at paragraph(s) of 52.212–3 Offeror Representations and Certifications—Commercial Items).
- Provision 52.222–58, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673).
- Clause 52.222–59, Compliance with Labor Laws (Executive Order 13673).
- Clause 52.222–60, Paycheck Transparency (Executive Order 13673).

The PRA supporting statement contains a discussion of the public comments submitted to the proposed rule information collection analysis and supporting statement. Respondents submitted public comments on various aspects of the estimates in the proposed rule PRA supporting statement and were critical of estimating methods used and expressed that many cost elements were missing from the estimates or were (sometimes significantly) underestimated. The cost elements addressed in the public comments with respect to the PRA included: (1) Regulatory familiarization, (2) recordkeeping, and (3) burden hours.

The public comments were carefully considered in developing the estimates for the final rule supporting statement. The supporting statement estimates were prepared in coordination with, and relied heavily on, the final Regulatory Impact Analysis (RIA). The RIA is a joint FAR Council and DOL product with substantial analysis provided by DOL in its capacity as a program agency and advisor to the FAR Council on labor matters.

As a result of the consideration of public comments adjustments were made to reflect the following (note that the table numbers cited in this summary correlate to the table numbers appearing in the PRA supporting statement)—

(1) Regulatory familiarization—Larger and more complex organizational structures will require more hours and the time of an attorney is warranted. Therefore the estimate for regulatory review and familiarization has been significantly increased in the final rule. See Table 7 for initial costs and Table 5 for annual regulatory review costs that

will be incurred for new entrants in subsequent years.

(2) Recordkeeping—Contractors and subcontractors may establish new internal control systems or modify existing systems in order to track and report labor law decisions and related information and to manage and track subcontractor compliance with the disclosure requirements. Estimates have been included for initial startup and annual maintenance costs for tracking mechanisms. The estimates took into consideration that for those contractors with the least complicated organizational structures, a commercial software program may suffice, for others revising existing systems or building additional functionality and capability into existing systems may suffice, and yet for others development of a web-based compliance system may be necessary. The estimates considered a stratification of contractors by organizational complexity. See Table 8 for nonrecurring initial start-up costs and Table 4 for recurring annual maintenance costs.

(3) Burden hours—The comments on the calculations of burden hours reflected concerns with the estimates of (i) Population of affected contractors; (ii) percentage of those contractors estimated to be violators; (iii) omission of overhead in the estimates of labor burden; and (iv) underestimating the hours needed to accomplish required tasks.

(i) Population of affected contractors—The estimating methodology for prime contractors and subcontractors was revised. The most significant revision in methodology was in aligning the population of affected contractors with the legal entity making the offer, which is the scope of the reporting burden. The final rule uses Tax Identification Numbers (TIN), rather than the DUNS number, to identify unique prime contractors that will be impacted by this rule. The unique subcontractor population was determined using a methodology that assumes the subcontractor population is a factor of the unique prime contractor population.

(ii) Percentage of contractors estimated to be violators—

The estimating methodology has been revised to use a randomly selected statistically representative sample of 400 Federal contractors with at least one award over $500,000 from FY 2013 FPDS. A detailed description of the methodology can be found in the RIA, section D.2. Population of Contractors and Subcontractors with Labor and Employment Violations. The estimated percent of Federal contractors and subcontractors that will have labor law decisions subject to disclosure has been revised from 4.05 percent in the proposed RIA to 9.67 percent in the final RIA. A detailed description of the methodology is found in the RIA, section A. Contractor and Subcontractor Populations.

(iii) Overhead as a component of labor burden—While overhead impacts exist, they are difficult to effectively quantify for this regulatory action. The final RIA contains a lengthy discussion that considers inclusion of overhead and how overhead has been included in a number of recent regulatory actions, see section B. Hourly Compensation Rates. The RIA, in footnote 21, applies a 17% overhead rate, which is the rate utilized by EPA in a recent rule, as example to demonstrate the affect overhead might have on the estimate for this final rule.

(iv) Burden hours—The tasks necessary to comply with the representation and disclosure requirements of the rule were carefully considered, and estimates have been adjusted as shown in Table 1 and summarized in Table 3 (Table 3 is reproduced below). With regard to the labor burden hours for specific representation and disclosure tasks, the estimates generally did not increase in recognition of the inclusion of costs for contractors and subcontractors to modify or develop tracking system mechanisms. Inherent in the development of such systems are internal controls and protocols and processes which will greatly streamline the information retrieval process. The majority of the labor violation disclosure effort is at the initial representation and as such the greatest number of hours is allotted to the initial response. A detailed breakdown, including explanatory footnotes, of estimated burden hours can be found in Table 1, Reporting Estimate. It should be noted that estimates for burden hours considered that the time needed for a simple disclosure and for a complex disclosure vary; and that across the universe of disclosures, a greater proportion are simple, *i.e.,* for single or non-complex labor law violations. Annualized cost estimates for this supporting statement have been prepared assuming the full implementation of the rule, *i.e.,* upon completion of all phase-in periods. The RIA and PRA supporting statement are not intended to match each other as they are representative of different analyses and timeframes.

TABLE 3—SUMMARY OF TABLE 1 ANNUAL ESTIMATED COST TO THE PUBLIC OF REPORTING BURDEN*

Number of respondents	24,183
Responses per respondent	17.3
Total annual responses	417,808
Hours per response	5.19
Total hours	2,166,815
Rate per hour (average)	$61.43
Total annual cost to public	$133,109,793

*Totals may not sum due to rounding.

A number of other tables in the supporting statement estimate cost elements including—annual recurring costs to include maintenance of tracking mechanism costs and costs incurred by new entrants (see Tables 4 and 5); and nonrecurring costs to include regulatory review and familiarization (see Table 7) and contractor business systems (see Table 8). The summary of total costs to the public is captured in Tables 10a and 10b, reproduced below.

TABLE 10a—SUMMARY OF TOTAL COSTS TO THE PUBLIC

[First year of full implementation]

Cost element	Cost
Table 3. Annual Reporting(Recurring)	$133,109,793
Table 9. Initial Start Up (Nonrecurring)	321,534,290
Total Initial Public Costs	454,644,083

TABLE 10b—SUMMARY OF TOTAL COSTS TO THE PUBLIC

[Subsequent years]

Cost element	Cost
Table 3. Annual Reporting (Recurring)	$133,109,793
Table 6. Other Recurring Costs	126,931,469
Total Annual Subsequent Public Costs	260,041,262

List of Subjects in 48 CFR Parts 1, 4, 9, 17, 22, 42, and 52

Government procurement.

Dated: August 10, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 4, 9, 17, 22, 42, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 4, 9, 17, 22, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

■ 2. Amend section 1.106 in the table following the introductory text, by adding in numerical sequence, FAR segments "52.222–57", "52.222–58", 52.222–59", and 52.222–60" and their corresponding OMB Control Number "9000–0195".

PART 4—ADMINISTRATIVE MATTERS

■ 3. Amend section 4.1202 by redesignating paragraphs (a)(21) through (31) as paragraphs (a)(22) through (32), respectively; and adding a new paragraph (a)(21) to read as follows:

4.1202 Solicitation provision and contract clause.

(a) * * *

(21) 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673).

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

■ 4. Amend section 9.104–4 by redesignating paragraph (b) as paragraph (c); and adding a new paragraph (b) to read as follows:

9.104–4 Subcontractor responsibility.

* * * * *

(b) For Executive Order (E.O.) 13673, Fair Pay and Safe Workplaces, requirements pertaining to labor law violations, see subpart 22.20.

* * * * *

■ 5. Amend section 9.104–5 by redesignating paragraph (d) as paragraph (e); and adding a new paragraph (d) to read as follows:

9.104–5 Representation and certifications regarding responsibility matters.

* * * * *

(d) When an offeror provides an affirmative response to the provision at 52.222–57(c)(2), Representation Regarding Compliance with Labor Laws (Executive Order 13673), or its commercial item equivalent at 52.212–3(s)(2)(ii), the contracting officer shall follow the procedures in subpart 22.20.

* * * * *

■ 6. Amend section 9.104–6 by revising paragraph (b)(4) and adding paragraph (b)(6) to read as follows:

9.104–6 Federal Awardee Performance and Integrity Information System.

* * * * *

(b) * * *

(4) Since FAPIIS may contain information on any of the offeror's previous contracts and information covering a five-year period, some of that information may not be relevant to a determination of present responsibility, *e.g.,* a prior administrative action such as debarment or suspension that has expired or otherwise been resolved, or information relating to contracts for completely different products or services. Information in FAPIIS submitted pursuant to the following provision and clause is applicable above $500,000, and may be considered if the information is relevant to a procurement below $500,000: 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673), its commercial item equivalent at 52.212–3(s), and 52.222–59, Compliance with Labor Laws (Executive Order 13673).

* * * * *

(6) When considering information in FAPIIS previously submitted in response to the provision and clause listed at paragraph (b)(4) of this section the contracting officer—

(i) Shall follow the procedures in 22.2004–2, if the procurement is expected to exceed $500,000; or

(ii) May elect to follow the procedures in 22.2004–2, if the procurement is not expected to exceed $500,000.

* * * * *

■ 7. Amend section 9.105–1 by adding paragraph (b)(4) to read as follows:

9.105–1 Obtaining information.

* * * * *

(b) * * *

(4) When an offeror provides an affirmative response to the provision at 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673) at paragraph (c)(2), or its commercial item equivalent at 52.212–3(s)(2)(ii), the contracting officer shall follow the procedures in 22.2004–2.

* * * * *

9.105–3 [Amended]

■ 8. Amend section 9.105–3 by removing from paragraph (a) "provided in subpart 24.2" and adding "provided in 9.105–2(b)(2)(iii) and subpart 24.2" in its place.

PART 17—SPECIAL CONTRACTING METHODS

■ 9. Amend section 17.207 by—

■ a. Removing from paragraph (c)(6) "considered; and" and adding "considered;" in its place;

■ b. Removing from paragraph (c)(7) "satisfactory ratings." and adding "satisfactory ratings; and" in its place; and

■ c. Adding paragraph (c)(8).

The addition reads as follows:

17.207 Exercise of options.

* * * * *

(c) * * *

(8) The contractor's labor law decisions, mitigating factors, remedial measures, and the agency labor compliance advisor's analysis and advice have been considered in accordance with subpart 22.20, if the contract contains the clause 52.222–59, Compliance with Labor Laws (Executive Order 13673).

* * * * *

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 10. Amend section 22.000 by—

■ a. Removing from paragraph (a) "Deals with" and adding "Prescribes" in its places;

■ b. Revising paragraph (b); and

■ c. Removing from paragraph (c) "labor law." and adding "labor law and Executive order." in its place.

The revision reads as follows:

22.000 Scope of part.

* * * * *

(b) Prescribes contracting policy and procedures to implement each pertinent labor law and Executive order; and

* * * * *

■ 11. Amend section 22.102–2 by revising the section heading and paragraph (c)(1) and adding paragraph (c)(3) to read as follows:

22.102–2 Administration and enforcement.

* * * * *

(c)(1) The U.S. Department of Labor (DOL) is responsible for the administration and enforcement of the Occupational Safety and Health Act. DOL's Wage and Hour Division is responsible for administration and enforcement of numerous wage and hour statutes including—

(i) 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction) (see subpart 22.4);

(ii) 40 U.S.C. chapter 37, Contract Work Hours and Safety Standards (see subpart 22.3);

(iii) The Copeland Act (18 U.S.C. 874 and 40 U.S.C. 3145) (see 22.403–2);

(iv) 41 U.S.C. chapter 65, Contracts for Materials, Supplies, Articles, and Equipment Exceeding $15,000 (see subpart 22.6); and

(v) 41 U.S.C. chapter 67, Service Contract Labor Standards (see subpart 22.10).

* * * * *

(3) DOL's administration and enforcement authorities under the statutes and under the Executive orders implemented in this part do not limit the authority of contracting officers to administer and enforce the terms and conditions of agency contracts. However, DOL has regulatory authority to require contracting agencies to change contract terms to include missing contract clauses or wage determinations that are required by the FAR, or to withhold contract amounts (see, *e.g.*, 22.1015, 22.1022).

■ 12. Add section 22.104 to read as follows:

22.104 Agency labor advisors.

(a) *Appointment of agency labor advisors.* Agencies may designate or appoint labor advisors, according to agency procedures.

(b) *Duties.* Agency labor advisors are generally responsible for the following duties:

(1) Interfacing with DOL, agency labor compliance advisors (ALCAs) (as defined at 22.2002), outside agencies, contractors, and other parties in matters concerning interpretation, guidance, and enforcement of labor statutes, Executive orders, and implementing regulations applicable to agency contracts.

(2) Providing advice and guidance to the contracting agency regarding application of labor statutes, Executive orders, and implementing regulations in agency contracts.

(3) Serving as labor subject matter experts on all issues specific to part 22 and its prescribed contract clauses and provisions.

(c) Agency labor advisors are listed at *www.wdol.gov/ala.aspx.*

(d) For information about ALCAs, who provide support regarding Executive Order 13673, Fair Pay and Safe Workplaces, see subpart 22.20.

■ 13. Add subpart 22.20 to read as follows:

Subpart 22.20—Fair Pay and Safe Workplaces

Sec.

22.2000 Scope of subpart.
22.2001 Reserved.
22.2002 Definitions.
22.2003 Policy.
22.2004 Compliance with labor laws.
22.2004–1 General.
22.2004–2 Preaward assessment of an offeror's labor law violations.
22.2004–3 Postaward assessment of a prime contractor's labor law violations.
22.2004–4 Contractor preaward and postaward assessment of a subcontractor's labor law violations.
22.2005 Paycheck transparency.
22.2006 Arbitration of contractor employee claims.
22.2007 Solicitation provisions and contract clauses.

Subpart 22.20—Fair Pay and Safe Workplaces

22.2000 Scope of subpart.

This subpart prescribes policies and procedures to implement Executive Order (E.O.) 13673, Fair Pay and Safe Workplaces, dated July 31, 2014.

22.2001 [Reserved].

22.2002 Definitions.

As used in this subpart—

Administrative merits determination means certain notices or findings of labor law violations issued by an enforcement agency following an investigation. An administrative merits determination may be final or be subject to appeal or further review. To determine whether a particular notice or finding is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

Agency labor compliance advisor (ALCA) means the senior official designated in accordance with E.O. 13673. ALCAs are listed at *www.dol.gov/fairpayandsafeworkplaces.*

Arbitral award or decision means an arbitrator or arbitral panel determination that a labor law violation occurred, or that enjoined or restrained a violation of labor law. It includes an award or decision that is not final or is subject to being confirmed, modified, or vacated by a court, and includes an award or decision resulting from private or confidential proceedings. To determine whether a particular award or decision is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

Civil judgment means any judgment or order entered by any Federal or State court in which the court determined that a labor law violation occurred, or enjoined or restrained a violation of labor law. It includes a judgment or order that is not final or is subject to appeal. To determine whether a particular judgment or order is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

DOL Guidance means the Department of Labor (DOL) Guidance entitled: "Guidance for Executive Order 13673, 'Fair Pay and Safe Workplaces'." The DOL Guidance, dated August 25, 2016, can be obtained from *www.dol.gov/fairpayandsafeworkplaces.*

Enforcement agency means any agency granted authority to enforce the Federal labor laws. It includes the enforcement components of DOL (Wage and Hour Division, Office of Federal Contract Compliance Programs, and Occupational Safety and Health Administration), the Equal Employment Opportunity Commission, the Occupational Safety and Health Review Commission, and the National Labor Relations Board. It also means a State agency designated to administer an OSHA-approved State Plan, but only to the extent that the State agency is acting in its capacity as administrator of such plan. It does not include other Federal agencies which, in their capacity as contracting agencies, conduct investigations of potential labor law violations. The enforcement agencies associated with each labor law under E.O. 13673 are—

(1) Department of Labor Wage and Hour Division (WHD) for—

(i) The Fair Labor Standards Act;

(ii) The Migrant and Seasonal Agricultural Worker Protection Act;

(iii) 40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act;

(iv) 41 U.S.C. chapter 67, formerly known as the Service Contract Act;

(v) The Family and Medical Leave Act; and

(vi) E.O. 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors);

(2) Department of Labor Occupational Safety and Health Administration (OSHA) for—

(i) The Occupational Safety and Health Act of 1970; and

(ii) OSHA-approved State Plans;

(3) Department of Labor Office of Federal Contract Compliance Programs (OFCCP) for—

(i) Section 503 of the Rehabilitation Act of 1973;

(ii) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974; and

(iii) E.O. 11246 of September 24, 1965 (Equal Employment Opportunity);

(4) National Labor Relations Board (NLRB) for the National Labor Relations Act; and

(5) Equal Employment Opportunity Commission (EEOC) for—

(i) Title VII of the Civil Rights Act of 1964;

(ii) The Americans with Disabilities Act of 1990;

(iii) The Age Discrimination in Employment Act of 1967; and

(iv) Section 6(d) of the Fair Labor Standards Act (Equal Pay Act).

Labor compliance agreement means an agreement entered into between a contractor or subcontractor and an enforcement agency to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with the labor laws, or other related matters.

Labor laws means the following labor laws and E.O.s:

(1) The Fair Labor Standards Act.

(2) The Occupational Safety and Health Act (OSHA) of 1970.

(3) The Migrant and Seasonal Agricultural Worker Protection Act.

(4) The National Labor Relations Act.

(5) 40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act.

(6) 41 U.S.C. chapter 67, formerly known as the Service Contract Act.

(7) E.O. 11246 of September 24, 1965 (Equal Employment Opportunity).

(8) Section 503 of the Rehabilitation Act of 1973.

(9) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

(10) The Family and Medical Leave Act.

(11) Title VII of the Civil Rights Act of 1964.

(12) The Americans with Disabilities Act of 1990.

(13) The Age Discrimination in Employment Act of 1967.

(14) E.O. 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors).

(15) Equivalent State laws as defined in the DOL Guidance. (The only equivalent State laws implemented in the FAR are OSHA-approved State Plans, which can be found at *www.osha.gov/dcsp/osp/approved_state_plans.html.*)

Labor law decision means an administrative merits determination, arbitral award or decision, or civil judgment, which resulted from a violation of one or more of the laws listed in the definition of "labor laws".

Pervasive violations, in the context of E.O. 13673, Fair Pay and Safe Workplaces, means labor law violations that bear on the assessment of a contractor's integrity and business ethics because they reflect a basic disregard by the contractor for the labor laws, as demonstrated by a pattern of serious and/or willful violations, continuing violations, or numerous violations. To determine whether violations are pervasive it is necessary to consult the DOL Guidance section III.A.4. and associated Appendix D.

Repeated violation, in the context of E.O. 13673, Fair Pay and Safe Workplaces, means a labor law violation that bears on the assessment of a contractor's integrity and business ethics because the contractor had one or more additional labor law violations of the same or a substantially similar requirement within the prior 3 years. To determine whether a particular violation(s) is repeated it is necessary to consult the DOL Guidance section III.A.2. and associated Appendix B.

Serious violation, in the context of E.O. 13673, Fair Pay and Safe Workplaces, means a labor law violation that bears on the assessment of a contractor's integrity and business ethics because of the number of employees affected; the degree of risk imposed, or actual harm done by the violation; the amount of damages incurred or fines or penalties assessed; and/or other similar criteria. To determine whether a particular violation(s) is serious it is necessary to consult the DOL Guidance section III.A.1. and associated Appendix A.

Willful violation, in the context of E.O. 13673, Fair Pay and Safe Workplaces, means a labor law violation that bears on the assessment of a contractor's integrity and business ethics because the contractor acted with knowledge of, reckless disregard for, or plain indifference to the matter of whether its conduct was prohibited by one or more requirements of labor laws. To determine whether a particular violation(s) is willful it is necessary to consult the DOL Guidance section III.A.3. and associated Appendix C.

22.2003 Policy.

It is the policy of the Federal Government to promote economy and efficiency in procurement by awarding contracts to contractors that promote safe, healthy, fair, and effective workplaces through compliance with labor laws, and by promoting opportunities for contractors to do the same when awarding subcontracts. Contractors and subcontractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services. This policy is supported by E.O. 13673, Fair Pay and Safe Workplaces.

22.2004 Compliance with labor laws.

22.2004–1 General.

(a) *Contracts.* An offeror on a solicitation estimated to exceed $500,000 must represent whether, in the past three years, any labor law decision(s), as defined at 22.2002, was rendered against it. If an offeror represents that a decision(s) was rendered against it, and if the contracting officer has initiated a responsibility determination, the contracting officer will require the offeror to submit information on the labor law decision(s) and afford the offeror an opportunity to provide such additional information as the prospective contractor deems necessary to demonstrate its responsibility including mitigating factors and remedial measures such as contractor actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws. The contractor must update the information semiannually in the System for Award Management (SAM). For further information, including about phase-ins, see the provisions and clauses prescribed at 22.2007(a) and (c).

(b) *Subcontracts.* Contractors are required to direct their prospective subcontractors to submit labor law decision information to DOL. Prospective subcontractors will also be afforded an opportunity to provide information to DOL on mitigating factors and remedial measures, such as subcontractor actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws. Contractors will consider DOL analysis and advice as they make responsibility determinations on their prospective subcontractors for subcontracts at any tier estimated to exceed $500,000, except for subcontracts for commercially available off-the-shelf items. Subcontractors must update the information semiannually. For further information, including about phase-ins, see the provision and clauses prescribed at 22.2007(b) and (c).

(c) *ALCA assistance.* The ALCA is responsible for accomplishing the specified objectives of the E.O., which include a number of overarching management functions. In addition, the ALCA provides support to the procurement process by—

(1) Encouraging prospective contractors and subcontractors that have labor law violations that may be serious, repeated, willful, and/or pervasive to work with enforcement agencies to discuss and address the labor law violations as soon as practicable;

(2) Providing input to the individual responsible for preparing and documenting past performance evaluations in Contractor Performance Assessment Reporting System (CPARS) (see 42.1502(j) and 42.1503) so that labor compliance may be considered during source selection;

(3) Providing written analysis and advice to the contracting officer for consideration in the responsibility determination and during contract performance (see 22.2004–2(b) and

22.2004–3(b)). The analysis requires obtaining labor law decision documents and, using DOL Guidance, assessing the labor law violations and information on mitigating factors and remedial measures, such as contractor actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws;

(4) Notifying, if appropriate, the agency suspending and debarring official, in accordance with agency procedures (see 9.406–3(a) and 9.407–3(a)), or advising that the contracting officer provide such notification;

(5) Monitoring SAM and FAPIIS for new and updated contractor disclosures of labor law decision information; and

(6) Making a notation in FAPIIS when the ALCA learns that a contractor has entered into a labor compliance agreement.

22.2004–2 Preaward assessment of an offeror's labor law violations.

(a) *General.* Before awarding a contract in excess of $500,000, the contracting officer shall—

(1) Consider relevant past performance information regarding compliance with labor laws when past performance is an evaluation factor; and

(2) Consider information concerning labor law violations when determining whether a prospective contractor is responsible and has a satisfactory record of integrity and business ethics.

(b) *Assessment of labor law violation information during responsibility determination.* When the contracting officer initiates a responsibility determination (see subpart 9.1) and a prospective contractor has provided an affirmative response to the representation at paragraph (c)(2) of the provision at 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673), or its equivalent for commercial items at 52.212–3(s)(2)(ii)—

(1) The contracting officer shall request that the prospective contractor—

(i) Disclose in SAM at *www.sam.gov* for each labor law decision, the following information, which will be publicly available in FAPIIS:

(A) The labor law violated.

(B) The case number, inspection number, charge number, docket number, or other unique identification number.

(C) The date rendered.

(D) The name of the court, arbitrator(s), agency, board, or commission rendering the determination or decision;

(ii) Provide such additional information, in SAM, as the prospective contractor deems necessary to demonstrate its responsibility, including mitigating factors and remedial measures such as actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws. Prospective contractors may provide explanatory text and upload documents in SAM. This information will not be made public unless the contractor determines that it wants the information to be made public; and

(iii) Provide the information in paragraphs (b)(1)(i) and (ii) of this section to the contracting officer if the prospective contractor meets an exception to SAM registration (see 4.1102(a));

(2) The contracting officer shall—

(i) Request that the ALCA provide written analysis and advice, as described in paragraph (b)(3) of this section, within three business days of the request, or another time period determined by the contracting officer;

(ii) Furnish to the ALCA all relevant information provided to the contracting officer by the prospective contractor; and

(iii) Request that the ALCA obtain copies of the administrative merits determination(s), arbitral award(s) or decision(s), or civil judgment(s), as necessary to support the ALCA's analysis and advice, and for each analysis that indicates an unsatisfactory record of labor law compliance. (The ALCA will notify the contracting officer if the ALCA is unable to obtain any of the necessary document(s); the contracting officer shall request that the prospective contractor provide the necessary documentation).

(3) The ALCA's advice to the contracting officer will include one of the following recommendations about the prospective contractor's record of labor law compliance in order to inform the contracting officer's assessment of the prospective contractor's integrity and business ethics. The prospective contractor's record of labor law compliance, including mitigating factors and remedial measures—

(i) Supports a finding, by the contracting officer, of a satisfactory record of integrity and business ethics;

(ii) Supports a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, but the prospective contractor needs to commit, after award, to negotiating a labor compliance agreement or another acceptable remedial action;

(iii) Could support a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, only if the prospective contractor commits, prior to award, to negotiating a labor compliance agreement or another acceptable remedial action;

(iv) Could support a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, only if the prospective contractor enters, prior to award, into a labor compliance agreement; or

(v) Does not support a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, and the agency suspending and debarring official should be notified in accordance with agency procedures;

(4) The ALCA will provide written analysis and advice, using the DOL Guidance, to support the recommendation made in paragraph (b)(3) of this section and for the contracting officer to consider in determining the prospective contractor's responsibility. The analysis and advice shall include the following information:

(i) Whether any labor law violations should be considered serious, repeated, willful, and/or pervasive.

(ii) The number and nature of labor law violations (depending on the nature of the labor law violation, in most cases, a single labor law violation may not necessarily give rise to a determination of lack of responsibility).

(iii) Whether there are any mitigating factors.

(iv) Whether the prospective contractor has initiated and implemented, in a timely manner—

(A) Its own remedial measures; and

(B) Other remedial measures entered into through agreement with or as a result of the actions or orders of an enforcement agency, court, or arbitrator.

(v) If the ALCA recommends pursuant to paragraphs (b)(3)(iii) or (iv) of this section that the prospective contractor commit to negotiate, or agree to enter into, a labor compliance agreement prior to award, the rationale for such timing (*e.g.,* (1) the prospective contractor has failed to take action or provide adequate justification for not negotiating when previously notified of the need for a labor compliance agreement, or (2) the labor violation history demonstrates an unsatisfactory record of integrity and business ethics unless an immediate commitment is made to negotiate a labor compliance agreement).

(vi) If the ALCA's recommendation is that the prospective contractor's record of labor law compliance does not support a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, the rationale for the recommendation (*e.g.,* a labor compliance agreement cannot be reasonably expected to improve future compliance; the prospective contractor has shown a basic disregard for labor law including by failing to enter into a labor compliance agreement after having been given reasonable time to do so; or the prospective contractor has breached an existing labor compliance agreement).

(vii) Whether the ALCA supports notification to the suspending and debarring official and whether the ALCA intends to make such notification.

(viii) If the ALCA recommends a labor compliance agreement pursuant to paragraphs (b)(3)(ii), (iii), or (iv) of this section, the name of the enforcement agency or agencies that would execute such agreement(s) with the prospective contractor.

(ix) Any such additional information that the ALCA finds to be relevant;

(5) The contracting officer shall—

(i) Consider the analysis and advice from the ALCA, if provided in a timely manner, in determining prospective contractors' responsibility;

(ii) Place the ALCA's written analysis, if provided, in the contract file with an explanation of how it was considered in the responsibility determination;

(iii) Proceed with making a responsibility determination if a timely written analysis is not received from an ALCA, using available information and business judgment; and

(iv) Comply with 9.103(b) when making a determination that a prospective small business contractor is nonresponsible and refer to the Small Business Administration for a Certificate of Competency;

(6) Disclosure of labor law decision(s) does not automatically render the prospective contractor nonresponsible. The contracting officer shall consider the offeror for contract award notwithstanding disclosure of one or more labor law decision(s), unless the contracting officer determines, after considering the analysis and advice from the ALCA on each of the factors described in paragraph (b)(4) of this section, and any other information considered by the contracting officer in performing related responsibility duties under 9.104–5 and 9.104–6, that the offeror does not have a satisfactory record of integrity and business ethics (*e.g.*, the ALCA's analysis of disclosed or otherwise known violations and lack of or insufficient remediation indicates a basic disregard for labor law).

(7) If the ALCA's assessment indicates a labor compliance agreement is warranted, the contracting officer shall provide written notification, prior to award, to the prospective contractor that states that the prospective contractor's disclosures have been analyzed by the ALCA using DOL's Guidance, that the ALCA has determined that a labor compliance agreement is warranted, and that identifies the name of the enforcement agency or agencies with whom the prospective contractor should confer regarding the negotiation of such agreement or other such action as agreed upon between the contractor and the enforcement agency or agencies.

(i) If the ALCA's recommendation is that the prospective contractor needs to commit, after award, to negotiating a labor compliance agreement or another acceptable remedial action (paragraph (b)(3)(ii) of this section), the notification shall indicate that—

(A) The prospective contractor is to provide a written response to the contracting officer and that the response is not required prior to contract award. The response is due in a time specified by the contracting officer. (The contracting officer shall specify a response time that the contracting officer determines is reasonable for the circumstances.);

(B) The contractor's response will be considered by the contracting officer in determining if application of a postaward contract remedy is appropriate. The prospective contractor's commitment to negotiate in a reasonable period of time will be assessed by the ALCA during contract performance (see 22.2004–3(b));

(C) The response shall either—

(*1*) Confirm the prospective contractor's intent to negotiate, in good faith within a reasonable period of time, a labor compliance agreement, or take other remedial action agreed upon between the contractor and the enforcement agency or agencies identified by the contracting officer, or

(*2*) Explain why the prospective contractor does not intend to negotiate a labor compliance agreement, or take other remedial action agreed upon between the contractor and the enforcement agency or agencies identified by the contracting officer; and

(D) The prospective contractor's failure to enter into a labor compliance agreement or take other remedial action agreed upon between the contractor and the enforcement agency or agencies within six months of contract award, absent explanation that the contracting officer considers to be adequate to justify the lack of agreement—

(*1*) Will be considered prior to the exercise of a contract option;

(*2*) May result in the application of a contract remedy; and

(*3*) Will be considered in any subsequent responsibility determination where the labor law decision on the unremediated violation falls within the disclosure period for that solicitation;

(ii) If the ALCA's recommendation is that the prospective contractor commit, prior to award, to negotiating a labor compliance agreement or another acceptable remedial action (paragraph (b)(3)(iii) of this section), use the procedures in paragraph (b)(7)(i) but substitute the following paragraphs (b)(7)(ii)(A) and (B) for paragraphs (b)(7)(i)(A) and (B):

(A) The prospective contractor is to provide a written response to the contracting officer and that the response is required prior to contract award. The response is due in a time specified by the contracting officer. (The contracting officer shall specify a response time that the contracting officer determines is reasonable for the circumstances.);

(B) The contractor's response will be considered by the contracting officer in determining responsibility.

(iii) If the ALCA's recommendation is that the prospective contractor enter, prior to award, into a labor compliance agreement (paragraph (b)(3)(iv) of this section), the notification shall state that the prospective contractor shall enter into a labor compliance agreement before contract award;

(8) The contracting officer shall notify the ALCA—

(i) Of the date notice was provided to the prospective contractor; and

(ii) If the prospective contractor fails to respond by the stated deadline or indicates that it does not intend to negotiate a labor compliance agreement; and

(9) If the prospective contractor enters into a labor compliance agreement, the entry shall be noted in FAPIIS by the ALCA.

(c)(1) The contracting officer may rely on an offeror's negative response to the representation at paragraph (c)(1) of the provision at 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673), or its equivalent for commercial items at 52.212–3(s)(2)(i) unless the contracting officer has reason to question the representation (*e.g.*, the ALCA has brought covered labor law decisions to the attention of the contracting officer).

(2) If the contracting officer has reason to question the representation, the contracting officer shall provide the prospective contractor an opportunity to correct its representation or provide the contracting officer an explanation as to why the negative representation is correct.

22.2004–3 Postaward assessment of a prime contractor's labor law violations.

(a) *Contractor duty to update.* (1) If there are new labor law decisions or updates to previously disclosed labor law decisions, the contractor is required to disclose this information in SAM at *www.sam.gov*, semiannually, pursuant to the clause at 52.222–59, Compliance with Labor Laws (Executive Order 13673).

(2) The contractor has flexibility in establishing the date for the semiannual update. The contractor may use the six-month anniversary date of contract award, or may choose a different date before that six-month anniversary date. In either case, the contractor must continue to update its disclosures semiannually.

(3) Registrations in SAM are required to be maintained current, accurate, and complete (see 52.204–13, System for Award Management Maintenance). If the SAM registration date is less than six months old, this will be evidence that the required representation and disclosure information is updated and the requirement is met.

(b) *Assessment of labor law violation information during contract performance.* (1) The ALCA monitors SAM and FAPIIS for new and updated labor law decision information pursuant to paragraph (a) of this section. If the ALCA is unable to obtain any needed relevant documents, the ALCA may request that the contracting officer obtain the documents from the contractor and provide them to the ALCA. If the contractor had previously agreed to enter into a labor compliance agreement, the ALCA verifies, consulting with DOL as needed, whether the contractor is making progress toward, or has entered into and is complying with a labor compliance agreement. The ALCA also considers labor law decision information received from sources other than SAM and FAPIIS. If this information indicates that further consideration or action may be warranted, the ALCA notifies the contracting officer in accordance with agency procedures.

(2) If the contracting officer was notified pursuant to paragraph (b)(1) of this section, the contracting officer shall request the contractor submit in SAM any additional information the contractor may wish to provide for the contracting officer's consideration, *e.g.*, remedial measures and mitigating factors or explanations for delays in entering into or for not complying with a labor compliance agreement. Contractors may provide explanatory text and upload documents in SAM. This information will not be made public unless the contractor determines that it wants the information to be made public.

(3) The ALCA will provide written analysis and advice, using the DOL Guidance, for the contracting officer to consider in determining whether a contract remedy is warranted. The analysis and advice shall include the following information:

(i) Whether any labor law violations should be considered serious, repeated, willful, and/or pervasive.

(ii) The number and nature of labor law violations (depending on the nature of the labor law violation, in most cases, a single labor law violation may not necessarily warrant action).

(iii) Whether there are any mitigating factors.

(iv) Whether the contractor has initiated and implemented, in a timely manner—

(A) Its own remedial measures; and/or

(B) Other remedial measures entered into through agreement with, or as a result of, the actions or orders of an enforcement agency, court, or arbitrator.

(v) Whether a labor compliance agreement or other remedial measure is—

(A) Warranted and the enforcement agency or agencies that would execute such agreement with the contractor;

(B) Under negotiation between the contractor and the enforcement agency;

(C) Established, and whether it is being adhered to; or

(D) Not being negotiated or has not been established, even though the contractor was notified that one had been recommended, and the contractor's rationale for not doing so.

(vi) Whether the absence of a labor compliance agreement or other remedial measure, or noncompliance with a labor compliance agreement, demonstrates a pattern of conduct or practice that reflects disregard for the recommendation of an enforcement agency.

(vii) Whether the labor law violation(s) merit consideration by the agency suspending and debarring official and whether the ALCA will make such a referral.

(viii) Any such additional information that the ALCA finds to be relevant.

(4) The contracting officer shall—

(i) Determine appropriate action, using the analysis and advice from the ALCA. Appropriate action may include—

(A) Continue the contract and take no remedial action; or

(B) Exercise a contract remedy, which may include one or more of the following:

(*1*)(*i*) Provide written notification to the contractor that a labor compliance agreement is warranted, using the procedures in 22.2004–2(b)(7) introductory paragraph and (b)(7)(i), appropriately modifying the content of the notification to the particular postaward circumstances (*e.g.*, change the time in paragraph 2004–2(b)(7)(i)(D) to "within six months of the notice"); and

(*ii*) Notify the ALCA of the date the notice was provided to the contractor; and notify the ALCA if the contractor fails to respond by the stated deadline or indicates that it does not intend to negotiate a labor compliance agreement.

(*2*) Elect not to exercise an option (see 17.207(c)(8)).

(*3*) Terminate the contract in accordance with the procedures set forth in part 49 or 12.403.

(*4*) In accordance with agency procedures (see 9.406–3(a) and 9.407–3(a)), notify the agency suspending and debarring official if the labor law violation(s) merit consideration; and

(ii) Place any ALCA written analysis in the contract file with an explanation of how it was considered.

(5) If the contractor enters into a labor compliance agreement, the entry shall be noted in FAPIIS by the ALCA.

22.2004–4 Contractor preaward and postaward assessment of a subcontractor's labor law violations.

(a) The provision at 52.222–58, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673), and the clause at 52.222–59, Compliance with Labor Laws (Executive Order 13673), have requirements for preaward subcontractor labor law decision disclosures and semiannual postaward updates during subcontract performance, and assessments thereof. This requirement applies to subcontracts at any tier estimated to exceed $500,000, other than for commercially available off-the-shelf items.

(b) If the contractor notifies the contracting officer of a determination and rationale for proceeding with subcontract award under 52.222–59(c)(5), the contracting officer should inform the ALCA.

22.2005 Paycheck transparency.

E.O. 13673 requires contractors and subcontractors to provide, on contracts that exceed $500,000, and subcontracts that exceed $500,000 other than for commercially available off-the-shelf items—

(a) A wage statement document (*e.g.*, a pay stub) in every pay period to all individuals performing work under the contract or subcontract, for which the contractor or subcontractor is required to maintain wage records under the Fair Labor Standards Act (FLSA), Wage Rate

Requirements (Construction) statute, or Service Contract Labor Standards statute. The clause at 52.222–60 Paycheck Transparency (Executive Order 13673) requires certain content to be provided in the wage statement; and

(b) A notice document to all individuals performing work under the contract or subcontract who are treated as independent contractors informing them of that status (see 52.222–60). The notice document must be provided either—

(1) At the time the independent contractor relationship with the individual is established; or

(2) Prior to the time that the individual begins to perform work on that Government contract or subcontract.

22.2006 Arbitration of contractor employee claims.

E.O. 13673 requires contractors, on contracts exceeding $1,000,000, to agree that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, be made only with the voluntary consent of employees or independent contractors after such disputes arise, subject to certain exceptions. This flows down to subcontracts exceeding $1,000,000 other than for the acquisition of commercial items.

22.2007 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the provision at 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673), in solicitations that contain the clause at 52.222–59.

(b) For solicitations issued on or after October 25, 2017, the contracting officer shall insert the provision at 52.222–58, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673), in solicitations that contain the clause at 52.222–59.

(c) The contracting officer shall insert the clause at 52.222–59, Compliance with Labor Laws (Executive Order 13673)—

(1) In solicitations with an estimated value of $50 million or more, issued from October 25, 2016 through April 24, 2017, and resultant contracts; and

(2) In solicitations that are estimated to exceed $500,000 issued after April 24, 2017 and resultant contracts.

(d) The contracting officer shall, beginning on January 1, 2017 insert the clause at 52.222–60, Paycheck Transparency (Executive Order 13673), in solicitations if the estimated value exceeds $500,000 and resultant contracts.

(e) The contracting officer shall insert the clause at 52.222–61, Arbitration of Contractor Employee Claims (Executive Order 13673), in solicitations if the estimated value exceeds $1,000,000, other than those for commercial items, and resultant contracts.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 14. Amend section 42.1502 by adding paragraph (j) to read as follows:

42.1502 Policy.

* * * * *

(j) Past performance evaluations shall include an assessment of contractor's labor violation information when the contract includes the clause at 52.222–59, Compliance with Labor Laws (Executive Order 13673). Using information available to a contracting officer, past performance evaluations shall consider—

(1) A contractor's relevant labor law violation information, *e.g.*, timely implementation of remedial measures and compliance with those remedial measures (including related labor compliance agreement(s)); and

(2) The extent to which the prime contractor addressed labor law violations by its subcontractors.

■ 15. Amend section 42.1503 by—

■ a. Removing from paragraph (a)(1)(i) "management office and," and adding "management office, agency labor compliance advisor (ALCA) office (see subpart 22.20), and," in its place;

■ b. Removing from paragraph (a)(1)(ii) "service, and" and adding "service, ALCA, and" in its place; and

■ c. Adding paragraph (h)(5).

The addition reads as follows:

42.1503 Procedures.

* * * * *

(h) * * *

(5) *References to entries by the Government into FAPIIS that are not performance information.* For other entries into FAPIIS by the contracting officer see 9.105–2(b)(2) for documentation of a nonresponsibility determination. See 22.2004–1(c)(6) for documentation by the ALCA of a labor compliance agreement. See 9.406–3(f)(1) and 9.407–3(e) for entry by a suspending or debarring official of information regarding an administrative agreement.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 16. Amend section 52.204–8 by—

■ a. Revising the date of the provision;

■ b. Redesignating paragraphs (c)(1)(xv) through (xxii) as paragraphs (c)(1)(xvi) through (xxiii), respectively; and

■ c. Adding a new paragraph (c)(1)(xv).

The revision and addition read as follows:

52.204–8 Annual Representations and Certifications.

* * * * *

Annual Representations and Certifications (OCT 2016)

* * * * *

(c)(1) * * *

(xv) 52.222–57, Representation Regarding Compliance with Labor Laws (Executive Order 13673). This provision applies to solicitations expected to exceed $50 million which are issued from October 25, 2016 through April 24, 2017, and solicitations expected to exceed $500,000, which are issued after April 24, 2017.

* * * * *

■ 17. Amend section 52.212–3 by—

■ a. Revising the date of the provision;

■ b. Removing from the introductory text "(c) through (r)" and adding "(c) through (s)" in its place;

■ c. Adding to paragraph (a), in alphabetical order, the definitions "Administrative merits determination", "Arbitral award or decision", "Civil judgment", "DOL Guidance", "Enforcement agency", "Labor compliance agreement", "Labor laws" and "Labor law decision";

■ d. Removing from paragraph (b)(2) "(c) through (r)" and adding "(c) through (s)" in its place; and

■ e. Adding paragraph (s).

The revision and additions read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (OCT 2016)

* * * * *

(a) * * *

Administrative merits determination means certain notices or findings of labor law violations issued by an enforcement agency following an investigation. An administrative merits determination may be final or be subject to appeal or further review. To determine whether a particular notice or finding is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

Arbitral award or decision means an arbitrator or arbitral panel determination that a labor law violation occurred, or that enjoined or restrained a violation of labor law. It includes an award or decision that is not final or is subject to being confirmed, modified, or vacated by a court, and includes an award or decision resulting from private or confidential proceedings. To determine whether a particular award or decision is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

Civil judgment means—

(1) In paragraph (h) of this provision: A judgment or finding of a civil offense by any court of competent jurisdiction.

(2) In paragraph (s) of this provision: Any judgment or order entered by any Federal or State court in which the court determined that a labor law violation occurred, or enjoined or restrained a violation of labor law. It includes a judgment or order that is not final or is subject to appeal. To determine whether a particular judgment or order is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

DOL Guidance means the Department of Labor (DOL) Guidance entitled: "Guidance for Executive Order 13673, 'Fair Pay and Safe Workplaces' ". The DOL Guidance, dated August 25, 2016, can be obtained from *www.dol.gov/fairpayandsafeworkplaces.*

* * * * *

Enforcement agency means any agency granted authority to enforce the Federal labor laws. It includes the enforcement components of DOL (Wage and Hour Division, Office of Federal Contract Compliance Programs, and Occupational Safety and Health Administration), the Equal Employment Opportunity Commission, the Occupational Safety and Health Review Commission, and the National Labor Relations Board. It also means a State agency designated to administer an OSHA-approved State Plan, but only to the extent that the State agency is acting in its capacity as administrator of such plan. It does not include other Federal agencies which, in their capacity as contracting agencies, conduct investigations of potential labor law violations. The enforcement agencies associated with each labor law under E.O. 13673 are—

(1) Department of Labor Wage and Hour Division (WHD) for—

(i) The Fair Labor Standards Act;

(ii) The Migrant and Seasonal Agricultural Worker Protection Act;

(iii) 40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act;

(iv) 41 U.S.C. chapter 67, formerly known as the Service Contract Act;

(v) The Family and Medical Leave Act; and

(vi) E.O. 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors);

(2) Department of Labor Occupational Safety and Health Administration (OSHA) for—

(i) The Occupational Safety and Health Act of 1970; and

(ii) OSHA-approved State Plans;

(3) Department of Labor Office of Federal Contract Compliance Programs (OFCCP) for—

(i) Section 503 of the Rehabilitation Act of 1973;

(ii) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974; and

(iii) E.O. 11246 of September 24, 1965 (Equal Employment Opportunity);

(4) National Labor Relations Board (NLRB) for the National Labor Relations Act; and

(5) Equal Employment Opportunity Commission (EEOC) for—

(i) Title VII of the Civil Rights Act of 1964;

(ii) The Americans with Disabilities Act of 1990;

(iii) The Age Discrimination in Employment Act of 1967; and

(iv) Section 6(d) of the Fair Labor Standards Act (Equal Pay Act).

* * * * *

Labor compliance agreement means an agreement entered into between a contractor or subcontractor and an enforcement agency to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with the labor laws, or other related matters.

Labor laws means the following labor laws and E.O.s:

(1) The Fair Labor Standards Act.

(2) The Occupational Safety and Health Act (OSHA) of 1970.

(3) The Migrant and Seasonal Agricultural Worker Protection Act.

(4) The National Labor Relations Act.

(5) 40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act.

(6) 41 U.S.C. chapter 67, formerly known as the Service Contract Act.

(7) E.O. 11246 of September 24, 1965 (Equal Employment Opportunity).

(8) Section 503 of the Rehabilitation Act of 1973.

(9) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

(10) The Family and Medical Leave Act.

(11) Title VII of the Civil Rights Act of 1964.

(12) The Americans with Disabilities Act of 1990.

(13) The Age Discrimination in Employment Act of 1967.

(14) E.O. 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors).

(15) Equivalent State laws as defined in the DOL Guidance. (The only equivalent State laws implemented in the FAR are OSHA-approved State Plans, which can be found at *www.osha.gov/dcsp/osp/approved_state_plans.html*).

Labor law decision means an administrative merits determination, arbitral award or decision, or civil judgment, which resulted from a violation of one or more of the laws listed in the definition of "labor laws".

* * * * *

(s) *Representation regarding compliance with labor laws (Executive Order 13673).* If the offeror is a joint venture that is not itself a separate legal entity, each concern participating in the joint venture shall separately comply with the requirements of this provision.

(1)(i) For solicitations issued on or after October 25, 2016 through April 24, 2017: The Offeror [ ] does [ ] does not anticipate submitting an offer with an estimated contract value of greater than $50 million.

(ii) For solicitations issued after April 24, 2017: The Offeror [ ] does [ ] does not anticipate submitting an offer with an estimated contract value of greater than $500,000.

(2) If the Offeror checked "does" in paragraph (s)(1)(i) or (ii) of this provision, the Offeror represents to the best of the Offeror's knowledge and belief [*Offeror to check appropriate block*]:

[ ](i) There has been no administrative merits determination, arbitral award or decision, or civil judgment for any labor law violation(s) rendered against the offeror (see definitions in paragraph (a) of this section) during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter; or

[ ](ii) There has been an administrative merits determination, arbitral award or decision, or civil judgment for any labor law violation(s) rendered against the Offeror during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter.

(3)(i) If the box at paragraph (s)(2)(ii) of this provision is checked and the

Contracting Officer has initiated a responsibility determination and has requested additional information, the Offeror shall provide—

(A) The following information for each disclosed labor law decision in the System for Award Management (SAM) at *www.sam.gov,* unless the information is already current, accurate, and complete in SAM. This information will be publicly available in the Federal Awardee Performance and Integrity Information System (FAPIIS):

(*1*) The labor law violated.

(*2*) The case number, inspection number, charge number, docket number, or other unique identification number.

(*3*) The date rendered.

(*4*) The name of the court, arbitrator(s), agency, board, or commission that rendered the determination or decision;

(B) The administrative merits determination, arbitral award or decision, or civil judgment document, to the Contracting Officer, if the Contracting Officer requires it;

(C) In SAM, such additional information as the Offeror deems necessary to demonstrate its responsibility, including mitigating factors and remedial measures such as offeror actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws. Offerors may provide explanatory text and upload documents. This information will not be made public unless the contractor determines that it wants the information to be made public; and

(D) The information in paragraphs (s)(3)(i)(A) and (s)(3)(i)(C) of this provision to the Contracting Officer, if the Offeror meets an exception to SAM registration (see FAR 4.1102(a)).

(ii)(A) The Contracting Officer will consider all information provided under (s)(3)(i) of this provision as part of making a responsibility determination.

(B) A representation that any labor law decision(s) were rendered against the Offeror will not necessarily result in withholding of an award under this solicitation. Failure of the Offeror to furnish a representation or provide such additional information as requested by the Contracting Officer may render the Offeror nonresponsible.

(C) The representation in paragraph (s)(2) of this provision is a material representation of fact upon which reliance was placed when making award. If it is later determined that the Offeror knowingly rendered an erroneous representation, in addition to other remedies available to the Government, the Contracting Officer may terminate the contract resulting from this solicitation in accordance with the procedures set forth in FAR 12.403.

(4) The Offeror shall provide immediate written notice to the Contracting Officer if at any time prior to contract award the Offeror learns that its representation at paragraph (s)(2) of this provision is no longer accurate.

(5) The representation in paragraph (s)(2) of this provision will be public information in the Federal Awardee Performance and Integrity Information System (FAPIIS).

* * * * *

■ 18. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (b)(35) through (58) as paragraphs (b)(37) through ((60), respectively;

■ c. Adding new paragraphs (b)(35) and (36);

■ d. Redesignating paragraphs (e)(1)(xvi) through (xviii) as paragraphs (e)1)(xviii) through (xx), respectively;

■ e. Adding new paragraphs (e)(1)(xvi) and (xvii); and

■ f. Amending Alternate II by—

■ 1. Revising the date of the Alternate;

■ 2. Redesignating paragraphs (e)(1)(ii)(O) and (P) as paragraphs (e)(1)(ii)(Q) and (R); and

■ 3. Adding new paragraphs (e)(1)(ii)(O) and (P).

The revisions and additions read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (OCT 2016)

* * * * *

(b) * * *

__(1) * * *

__(35) 52.222–59, Compliance with Labor Laws (Executive Order 13673) (OCT 2016). (Applies at $50 million for solicitations and resultant contracts issued from October 25, 2016 through April 24, 2017; applies at $500,000 for solicitations and resultant contracts issued after April 24, 2017).

__(36) 52.222–60, Paycheck Transparency (Executive Order 13673) (OCT 2016).

* * * * *

(e)(1) * * *

(xvi) 52.222–59, Compliance with Labor Laws (Executive Order 13673) (OCT 2016) (Applies at $50 million for solicitations and resultant contracts issued from October 25, 2016 through April 24, 2017; applies at $500,000 for solicitations and resultant contracts issued after April 24, 2017).

(xvii) 52.222–60, Paycheck Transparency (Executive Order 13673) (OCT 2016)).

* * * * *

Alternate II (OCT 2016). * * *

(e)(1) * * *

(ii) * * *

(O) 52.222–59, Compliance with Labor Laws (Executive Order 13673) (OCT 2016).

(P) 52.222–60, Paycheck Transparency (Executive Order 13673) (OCT 2016).

* * * * *

■ 19. Amend section 52.213–4 by revising the date of the clause and paragraph (a)(2)(viii) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (OCT 2016)

(a) * * *

(2) * * *

(viii) 52.244–6, Subcontracts for Commercial Items (OCT 2016).

* * * * *

■ 20. Add section 52.222–57 to read as follows:

52.222–57 Representation Regarding Compliance with Labor Laws (Executive Order 13673).

As prescribed in 22.2007(a), insert the following provision:

Representation Regarding Compliance With Labor Laws (Executive Order 13673) (OCT 2016)

(a)(1) *Definitions.*

Administrative merits determination, arbitral award or *decision, civil judgment, DOL Guidance, enforcement agency, labor compliance agreement, labor laws,* and *labor law decision* as used in this provision have the meaning given in the clause in this solicitation entitled 52.222–59, Compliance with Labor Laws (Executive Order 13673).

(2) *Joint ventures.* If the offeror is a joint venture that is not itself a separate legal entity, each concern participating in the joint venture shall separately comply with the requirements of this provision.

(b)(1) For solicitations issued on or after October 25, 2016 through April 24, 2017: The Offeror [ ] does [ ] does not anticipate submitting an offer with an estimated contract value of greater than $50 million.

(2) For solicitations issued after April 24, 2017: The Offeror [ ] does [ ] does not anticipate submitting an offer with an estimated contract value of greater than $500,000.

(c) If the Offeror checked "does" in paragraph (b)(1) or (2) of this provision, the Offeror represents to the best of the Offeror's knowledge and belief [*Offeror to check appropriate block*]:

[ ](1) There has been no administrative merits determination, arbitral award or decision, or civil judgment for any labor law violation(s) rendered against the Offeror during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter; or

[ ](2) There has been an administrative merits determination, arbitral award or decision, or civil judgment for any labor law violation(s) rendered against the Offeror during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter.

(d)(1) If the box at paragraph (c)(2) of this provision is checked and the Contracting Officer has initiated a responsibility determination and has requested additional information, the Offeror shall provide—

(i) For each disclosed labor law decision in the System for Award Management (SAM) at *www.sam.gov*, the following, unless the information is already current, accurate, and complete in SAM. This information will be publicly available in the Federal Awardee Performance and Integrity Information System (FAPIIS):

(A) The labor law violated.

(B) The case number, inspection number, charge number, docket number, or other unique identification number.

(C) The date rendered.

(D) The name of the court, arbitrator(s), agency, board, or commission that rendered the determination or decision;

(ii) The administrative merits determination, arbitral award or decision, or civil judgment document to the Contracting Officer, if the Contracting Officer requires it;

(iii) In SAM, such additional information as the Offeror deems necessary to demonstrate its responsibility, including mitigating factors and remedial measures such as Offeror actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws. Offerors may provide explanatory text and upload documents. This information will not be made public unless the contractor determines that it wants the information to be made public; and

(iv) The information in paragraphs (d)(1)(i) and (d)(1)(iii) of this provision to the Contracting Officer, if the Offeror meets an exception to SAM registration (see 4.1102(a)).

(2)(i) The Contracting Officer will consider all information provided under (d)(1) of this provision as part of making a responsibility determination.

(ii) A representation that any labor law decisions were rendered against the Offeror will not necessarily result in withholding of an award under this solicitation. Failure of the Offeror to furnish a representation or provide such additional information as requested by the Contracting Officer may render the Offeror nonresponsible.

(iii) The representation in paragraph (c) of this provision is a material representation of fact upon which reliance was placed when making award. If it is later determined that the Offeror knowingly rendered an erroneous representation, in addition to other remedies available to the Government, the Contracting Officer may terminate the contract resulting from this solicitation in accordance with the procedures set forth in part 49.

(e) The Offeror shall provide immediate written notice to the Contracting Officer if at any time prior to contract award the Offeror learns that its representation at paragraph (c) of this provision is no longer accurate.

(f) The representation in paragraph (c) of this provision will be public information in the Federal Awardee Performance and Integrity Information System (FAPIIS).

(End of provision)

■ 21. Add section 52.222–58 to read as follows:

52.222–58 Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673).

As prescribed in 22.2007(b), insert the following provision:

Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673) (OCT 2016)

(a) *Definitions.*

Administrative merits determination, arbitral award or decision, civil judgment, DOL Guidance, enforcement agency, labor compliance agreement, labor laws, and *labor law decision* as used in this provision have the meaning given in the clause in this solicitation entitled 52.222–59, Compliance with Labor Laws (Executive Order 13673).

(b) *Subcontractor representation.* (1) The requirements of this provision apply to all prospective subcontractors at any tier submitting an offer for subcontracts where the estimated subcontract value exceeds $500,000 for other than commercially available off-the-shelf items. The Offeror shall require these prospective subcontractors to represent, to the Offeror, to the best of the subcontractor's knowledge and belief, whether there have been any administrative merits determinations, arbitral awards or decisions, or civil judgments for any labor law violation(s) rendered against the prospective subcontractor during the period beginning October 25, 2015 to the date of the offer, or for three years preceding the offer, whichever period is shorter.

(2) A contractor or subcontractor, acting in good faith, is not liable for misrepresentations made by its subcontractors about labor law decisions or about labor compliance agreements.

(c) *Subcontractor responsibility determination.* If the prospective subcontractor responded affirmatively to paragraph (b) of this provision and the Offeror initiates a responsibility determination, the Offeror shall follow the procedures in paragraph (c) of 52.222–59, Compliance with Labor Laws (Executive Order 13673).

(End of provision)

■ 59. Add section 52.222–59 to read as follows:

52.222–59 Compliance with Labor Laws (Executive Order 13673).

As prescribed in 22.2007(c), insert the following clause:

Compliance With Labor Laws (Executive Order 13673) (OCT 2016)

(a) *Definitions.* As used in this clause—

Administrative merits determination means certain notices or findings of labor law violations issued by an enforcement agency following an investigation. An administrative merits determination may be final or be subject to appeal or further review. To determine whether a particular notice or finding is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

Agency labor compliance advisor (ALCA) means the senior official designated in accordance with E.O. 13673. ALCAs are listed at *www.dol.gov/fairpayandsafeworkplaces.*

Arbitral award or decision means an arbitrator or arbitral panel determination that a labor law violation occurred, or that enjoined or restrained a violation of labor law. It includes an award or decision that is not final or is subject to being confirmed, modified, or vacated by a court, and includes an award or decision resulting from private or confidential proceedings. To determine whether a particular award or decision is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

Civil judgment means any judgment or order entered by any Federal or State court in which the court determined that a labor law violation occurred, or enjoined or restrained a violation of labor law. It includes a judgment or order that is not final or is subject to appeal. To determine whether a particular judgment or order is covered by this definition, it is necessary to consult section II.B. in the DOL Guidance.

DOL Guidance means the Department of Labor (DOL) Guidance entitled: "Guidance for Executive Order 13673, 'Fair Pay and Safe Workplaces' ". The DOL Guidance, dated August 25, 2016, can be obtained from *www.dol.gov/fairpayandsafeworkplaces.*

Enforcement agency means any agency granted authority to enforce the Federal labor laws. It includes the enforcement components of DOL (Wage and Hour Division, Office of Federal Contract Compliance Programs, and Occupational Safety and Health Administration), the Equal Employment Opportunity Commission, the Occupational Safety and Health Review Commission, and the National Labor Relations Board. It also means a State agency designated to administer an OSHA-approved State Plan, but only to the extent that the State agency is acting in its capacity as administrator of such plan. It does not include other Federal agencies which, in their capacity as contracting agencies, conduct investigations of potential labor law violations. The enforcement agencies associated with each labor law under E.O. 13673 are—

(1) Department of Labor Wage and Hour Division (WHD) for—

(i) The Fair Labor Standards Act;

(ii) The Migrant and Seasonal Agricultural Worker Protection Act;

(iii) 40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act;

(iv) 41 U.S.C. chapter 67, formerly known as the Service Contract Act;

(v) The Family and Medical Leave Act; and

(vi) E.O. 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors);

(2) Department of Labor Occupational Safety and Health Administration (OSHA) for—

(i) The Occupational Safety and Health Act of 1970; and

(ii) OSHA-approved State Plans;

(3) Department of Labor Office of Federal Contract Compliance Programs (OFCCP) for—

(i) Section 503 of the Rehabilitation Act of 1973;

(ii) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974; and

(iii) E.O. 11246 of September 24, 1965 (Equal Employment Opportunity);

(4) National Labor Relations Board (NLRB) for the National Labor Relations Act; and

(5) Equal Employment Opportunity Commission (EEOC) for—

(i) Title VII of the Civil Rights Act of 1964;

(ii) The Americans with Disabilities Act of 1990;

(iii) The Age Discrimination in Employment Act of 1967; and

(iv) Section 6(d) of the Fair Labor Standards Act (Equal Pay Act).

Labor compliance agreement means an agreement entered into between a contractor or subcontractor and an enforcement agency to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with the labor laws, or other related matters.

Labor laws means the following labor laws and E.O.s:

(1) The Fair Labor Standards Act.

(2) The Occupational Safety and Health Act (OSHA) of 1970.

(3) The Migrant and Seasonal Agricultural Worker Protection Act.

(4) The National Labor Relations Act.

(5) 40 U.S.C. chapter 31, subchapter IV, formerly known as the Davis-Bacon Act.

(6) 41 U.S.C. chapter 67, formerly known as the Service Contract Act.

(7) E.O. 11246 of September 24, 1965 (Equal Employment Opportunity).

(8) Section 503 of the Rehabilitation Act of 1973.

(9) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

(10) The Family and Medical Leave Act.

(11) Title VII of the Civil Rights Act of 1964.

(12) The Americans with Disabilities Act of 1990.

(13) The Age Discrimination in Employment Act of 1967.

(14) E.O. 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors).

(15) Equivalent State laws as defined in the DOL Guidance. (The only equivalent State laws implemented in the FAR are OSHA-approved State Plans, which can be found at *www.osha.gov/dcsp/osp/approved_state_plans.html.*)

Labor law decision means an administrative merits determination, arbitral award or decision, or civil judgment, which resulted from a violation of one or more of the laws listed in the definition of "labor laws".

Pervasive violations in the context of E.O. 13673, Fair Pay and Safe Workplaces, means labor law violations that bear on the assessment of a contractor's integrity and business ethics because they reflect a basic disregard by the contractor for the labor laws, as demonstrated by a pattern of serious and/or willful violations, continuing violations, or numerous violations. To determine whether violations are pervasive it is necessary to consult the DOL Guidance section III.A.4. and associated Appendix D.

Repeated violation in the context of E.O. 13673, Fair Pay and Safe Workplaces, means a labor law violation that bears on the assessment of a contractor's integrity and business ethics because the contractor had one or more additional labor law violations of the same or a substantially similar requirement within the prior 3 years. To determine whether a particular violation(s) is repeated it is necessary to consult the DOL Guidance section III.A.2. and associated Appendix B.

Serious violation in the context of E.O. 13673, Fair Pay and Safe Workplaces, means a labor law violation that bears on the assessment of a contractor's integrity and business ethics because of the number of employees affected; the degree of risk imposed, or actual harm done by the violation; the amount of damages incurred or fines or penalties assessed; and/or other similar criteria. To determine whether a particular violation(s) is serious it is necessary to consult the DOL Guidance section III.A.1. and associated Appendix A.

Willful violation in the context of E.O. 13673, Fair Pay and Safe Workplaces, means a labor law violation that bears on the assessment of a contractor's integrity and business ethics because the contractor acted with knowledge of, reckless disregard for, or plain indifference to the matter of whether its conduct was prohibited by one or more requirements of labor laws. To determine whether a particular violation(s) is willful it is necessary to consult the DOL Guidance section III.A.3. and associated Appendix C.

(b) *Prime contractor updates.* Contractors are required to disclose new labor law decisions and/or updates to previously disclosed labor law decisions in SAM at *www.sam.gov*, semiannually. The Contractor has flexibility in establishing the date for the semiannual update. (The contractor may use the six-month anniversary date of contract award, or may choose a different date before that six-month anniversary date. In either case, the contractor must continue to update its disclosures semiannually.) Registrations in SAM are required to be maintained current, accurate, and complete (see 52.204–13, System for Award Management Maintenance). If the SAM registration date is less than six months old, this will be evidence that the required representation and disclosure information is updated and the requirement is met. The Contractor shall provide—

(1) The following in SAM for each disclosed labor law decision. This information will be publicly available in the Federal Awardee Performance and Integrity Information System (FAPIIS):

(i) The labor law violated.

(ii) The case number, inspection number, charge number, docket number, or other unique identification number.

(iii) The date rendered.

(iv) The name of the court, arbitrator(s), agency, board, or commission that rendered the determination or decision;

(2) The administrative merits determination, arbitral award or decision, or civil judgment document to the Contracting Officer, if the Contracting Officer requires it;

(3) In SAM, such additional information as the Contractor deems necessary, including mitigating factors and remedial measures such as contractor actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws. Contractors may provide explanatory text and upload documents. This information will not be made public unless the Contractor determines that it wants the information to be made public; and

(4) The information in paragraphs (b)(1) and (b)(3) to the Contracting Officer, if the Contractor meets an exception to SAM registration (see 4.1102(a)).

(c) *Subcontractor responsibility.* (1) This paragraph (c) applies—

(i) To subcontracts with an estimated value that exceeds $500,000 for other than commercially available off-the-shelf items; and

(ii) When the provision 52.222–58, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673), is in the contract and the prospective subcontractor responded affirmatively to paragraph (b) of that provision, and the Contractor initiates a responsibility determination.

(2) The Contractor shall consider subcontractor labor law violation information when assessing whether a prospective subcontractor has a satisfactory record of integrity and business ethics with regard to compliance with labor laws, when determining subcontractor responsibility. Disclosure of labor law decision(s) does not automatically render the prospective subcontractor nonresponsible. The Contractor shall consider the prospective subcontractor for subcontract award notwithstanding disclosure of one or more labor law decision(s). The Contractor should encourage prospective subcontractors to contact DOL for a preassessment of their record of labor law compliance (see DOL Guidance Section VI, Preassessment). The Contractor shall complete the assessment—

(i) For subcontracts awarded within five days of the prime contract award or that become effective within five days of the prime contract award, no later than 30 days after subcontract award; or

(ii) For all other subcontracts, prior to subcontract award. However, in urgent circumstances, the assessment shall be completed within 30 days of subcontract award.

(3)(i) The Contractor shall require a prospective subcontractor to represent to the best of the subcontractor's knowledge and belief whether there have been any administrative merits determinations, arbitral awards or decisions, or civil judgments, for any labor law violation(s) rendered against the subcontractor during the period beginning on October 25, 2015 to the date of the subcontractor's offer, or for three years preceding the date of the subcontractor's offer, whichever period is shorter.

(ii) When determining subcontractor responsibility, the Contractor shall require the prospective subcontractor to disclose to DOL, in accordance with paragraph (c)(3)(iv) of this clause, for each covered labor law decision, the following information:

(A) The labor law violated.

(B) The case number, inspection number, charge number, docket number, or other unique identification number.

(C) The date rendered.

(D) The name of the court, arbitrator(s), agency, board, or commission that rendered the determination or decision.

(iii) The Contractor shall inform the prospective subcontractor that the prospective subcontractor may provide information to DOL, in accordance with paragraph (c)(3)(iv) of this clause, on mitigating factors and remedial measures, such as subcontractor actions taken to address the violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws.

(iv) The Contractor shall require subcontractors to provide information required by paragraph (c)(3)(ii) and discussed in paragraph (c)(3)(iii) of this clause to DOL through the DOL Web site at *www.dol.gov/fairpayandsafeworkplaces.*

(4) The Contractor, in determining subcontractor responsibility, may find that the prospective subcontractor has a satisfactory record of integrity and business ethics with regard to compliance with labor laws if—

(i) The prospective subcontractor provides a negative response to the Contractor in its representation made pursuant to paragraph (c)(3)(i) of this clause; or

(ii) The prospective subcontractor—

(A) Provides a positive response to the Contractor in its representation made pursuant to paragraph (3)(i);

(B) Represents, to the Contractor, to the best of the subcontractor's knowledge and belief that it has disclosed to DOL any administrative merits determinations, arbitral awards or decisions, or civil judgments for any labor law violation(s) rendered against the subcontractor during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter; and

(C) Provides the following information concerning DOL review and assessment of subcontractor-disclosed information—

(*1*) The subcontractor has been advised by DOL that it has no serious, repeated, willful, and/or pervasive labor law violations;

(*2*) The subcontractor has been advised by DOL that it has serious, repeated, willful, and/or pervasive labor law violations; and

(*i*) DOL has advised that a labor compliance agreement is not warranted because, for example, the subcontractor has initiated and implemented its own remedial measures;

(*ii*) The subcontractor has entered into a labor compliance agreement(s) with an enforcement agency and states that it has not been notified by DOL that it is not complying with its agreement; or

(*iii*) The subcontractor has agreed to enter into a labor compliance agreement or is considering a labor compliance agreement(s) with an enforcement agency to address all disclosed labor law violations that DOL has determined to be serious, willful, repeated, and/or pervasive labor law violations and has not been notified by DOL that it has not entered into an agreement in a reasonable period; or

(*3*) The subcontractor disagrees with DOL's advice (*e.g.,* that a proposed labor compliance agreement is warranted), or with DOL's notification that it has not entered into a labor compliance agreement in a reasonable period or is not complying with the agreement, and the subcontractor has provided the Contractor with—

(*i*) Information about all the disclosed labor law violations that have been determined by DOL to be serious, repeated, willful, and/or pervasive;

(*ii*) Such additional information that the subcontractor deems necessary to demonstrate its responsibility, including mitigating factors, remedial measures such as subcontractor actions taken to address the labor law violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws;

(*iii*) A description of DOL's advice or a description of an enforcement agency's proposed labor compliance agreement; and

(*iv*) An explanation of the basis for the subcontractor's disagreement with DOL.

(5) If the Contractor determines that the subcontractor has a satisfactory record of integrity and business ethics based on the information provided pursuant to paragraph (c)(4)(ii)(C)(*3*), or the Contractor determines that due to a compelling reason the contractor must proceed with subcontract award, the Contractor shall notify the Contracting Officer of the decision and provide the following information in writing:

(i) The name of the subcontractor.

(ii) The basis for the decision, *e.g.,* relevancy to the requirement, urgent and compelling circumstances, to prevent delays during contract performance, or when only one supplier is available to meet the requirement.

(6) If DOL does not provide advice to the subcontractor within three business days of the subcontractor's disclosure of labor law decision information pursuant to paragraph (c)(3)(ii) and DOL did not previously advise the subcontractor that it needed to enter into a labor compliance agreement to address labor law violations, the Contractor may proceed with making a responsibility determination using available information and business judgment.

(d) *Subcontractor updates.* (1) The Contractor shall require subcontractors to determine, semiannually, whether labor law decision disclosures provided to DOL pursuant to paragraph (c)(3)(ii) of this clause are current, accurate, and complete. If the information is current, accurate, and complete, no action is required. If the information is not current, accurate, and complete, subcontractors must provide revised information to DOL, in accordance with paragraph (c)(3)(iv) of this clause, and make a new representation and provide information to the Contractor pursuant to paragraph (c)(4)(ii) of this clause to reflect any advice provided by DOL or other actions taken by the subcontractor.

(2) The Contractor shall further require the subcontractor to disclose during the course of performance of the subcontract any notification by DOL, within 5 business days of such notification, that it has not entered into a labor compliance agreement in a reasonable period or is not complying with a labor compliance agreement, and shall allow the subcontractor to provide an explanation and supporting information for the delay or non-compliance.

(3) The Contractor shall consider, in a timely manner, information obtained from subcontractors pursuant to paragraphs (d)(1) and (2) of this clause, and determine whether action is necessary.

(4) If the Contractor has been informed by the subcontractor of DOL's assessment that the subcontractor has not demonstrated compliance with labor laws, and the Contractor decides to continue the subcontract, the Contractor shall notify the Contracting Officer of its decision to continue the subcontract and provide the following information in writing:

(i) The name of the subcontractor; and

(ii) The basis for the decision, *e.g.,* relevancy to the requirement, urgent and compelling circumstances, to prevent delays during contract performance, or when only one supplier is available to meet the requirement.

(e) *Consultation with DOL and other enforcement agencies.* The Contractor may consult with DOL and enforcement agency representatives, using DOL Guidance at *www.dol.gov/fairpayandsafeworkplaces*, for advice and assistance regarding assessment of subcontractor labor law violation(s), including whether new or enhanced labor compliance agreements are warranted. Only DOL and enforcement agency representatives are available to consult with Contractors regarding subcontractor information. Contracting Officers or Agency Labor Compliance Advisors may assist with identifying the appropriate DOL and enforcement agency representatives.

(f) *Protections for subcontractor misrepresentations.* A contractor or subcontractor, acting in good faith, is not liable for misrepresentations made by its subcontractors about labor law decisions or about labor compliance agreements.

(g) *Subcontractor flowdown.* If the Government's solicitation included the provision at 52.222–58, the Contractor shall include the substance of paragraphs (a), (c), (d), (e), (f) and (g) of this clause, in subcontracts with an estimated value exceeding $500,000, at all tiers, for other than commercially available off-the-shelf items.

(End of clause)

■ 23. Add section 52.222–60 to read as follows:

52.222–60 Paycheck Transparency (Executive Order 13673).

As prescribed in 22.2007(d), insert the following clause:

Paycheck Transparency (Executive Order 13673) (OCT 2016)

(a) *Wage statement.* In each pay period, the Contractor shall provide a wage statement document (*e.g.* a pay stub) to all individuals performing work under the contract subject to the wage records requirements of any of the following statutes:

(1) The Fair Labor Standards Act.

(2) 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction) (formerly known as the Davis Bacon Act).

(3) 41 U.S.C. chapter 67, Service Contract Labor Standards (formerly known as the Service Contract Act of 1965).

(b) *Content of wage statement.* (1) The wage statement shall be issued every pay period and contain—

(i) The total number of hours worked in the pay period;

(ii) The number of those hours that were overtime hours;

(iii) The rate of pay (*e.g.,* hourly rate, piece rate);

(iv) The gross pay; and

(v) Any additions made to or deductions taken from gross pay. These shall be itemized. The itemization shall identify and list each one separately, as well as the specific amount added or deducted for each.

(2) If the wage statement is not provided weekly and is instead provided bi-weekly or semi-monthly (because the pay period is bi-weekly or semi-monthly), the hours worked and overtime hours contained in the wage statement shall be broken down to correspond to the period (which will almost always be weekly) for which overtime is calculated and paid.

(3) The wage statement provided to an individual exempt from the overtime compensation requirements of the Fair Labor Standards Act (FLSA) need not

include a record of hours worked, if the Contractor informs the individual in writing of his or her overtime exempt status. The notice may not indicate or suggest that DOL or the courts agree with the Contractor's determination that the individual is exempt. The notice must be given either before the individual begins work on the contract, or in the first wage statement under the contract. Notice given before the work begins can be a stand-alone document, or can be in an offer letter, employment contract, or position description. If during performance of the contract, the Contractor determines that the individual's status has changed from non-exempt to exempt from overtime, it must provide the notice to the individual before providing a wage statement without hours worked information or in the first wage statement after the change.

(c) *Substantially similar laws.* A Contractor satisfies this wage statement requirement by complying with the wage statement requirement of any State or locality (in which the Contractor has employees) that has been determined by the United States Secretary of Labor to be substantially similar to the wage statement requirement in this clause. The determination of substantially similar wage payment states may be found at *www.dol.gov/fairpayandsafeworkplaces.*

(d) *Independent contractor.* (1) If the Contractor is treating an individual performing work under the contract as an independent contractor (*e.g.,* an individual who is in business for him or herself or is self-employed) and not as an employee, the Contractor shall provide a written document to the individual informing the individual of this status. The document may not indicate or suggest that the enforcement agencies or the courts agree with the Contractor's determination that the worker is an independent contractor. The Contractor shall provide the document to the individual either at the time an independent contractor relationship is established with the individual or prior to the time the individual begins to perform work on the contract. The document must be provided for this contract, even if the worker was notified of independent contractor status on other contracts. The document must be separate from any independent contractor agreement between the Contractor and the individual. If the Contractor determines that a worker's status while performing work on the contract changes from employee to independent contractor, then the Contractor shall provide the worker with notice of independent contractor status before the worker performs any work under the contract as an independent contractor.

(2) The fact that the Contractor does not make social security, Medicare, or income tax withholding deductions from the individual's pay and that an individual receives at year end an IRS Form 1099-Misc is not evidence that the Contractor has correctly classified the individual as an independent contractor under the labor laws.

(e) *Notices*—(1) *Language.* Where a significant portion of the workforce is not fluent in English, the Contractor shall provide the wage statement required in paragraph (a) of this clause, the overtime exempt status notice described in paragraph (b)(3) of this clause, and the independent contractor notification required in paragraph (d) of this clause in English and the language(s) with which the significant portion(s) of the workforce is fluent.

(2) *Electronic notice.* If the Contractor regularly provides documents to its workers by electronic means, the Contractor may provide to workers electronically the written documents and notices required by this clause. Workers must be able to access the document through a computer, device, system or network provided or made available by the Contractor.

(f) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (f), in all subcontracts that exceed $500,000, at all tiers, for other than commercially available off-the-shelf items.

(End of clause)

■ 24. Add section 52.222–61 to read as follows:

52.222–61 Arbitration of Contractor Employee Claims (Executive Order 13673).

As prescribed in 22.2007(e), insert the following clause:

Arbitration of Contractor Employee Claims (Executive Order 13673) (OCT 2016)

(a) The Contractor hereby agrees that the decision to arbitrate claims arising under title VII of the Civil Rights Act of 1964, or any tort related to or arising out of sexual assault or harassment, shall only be made with the voluntary consent of employees or independent contractors after such disputes arise.

(b) This does not apply to—

(1) Employees covered by a collective bargaining agreement negotiated between the Contractor and a labor organization representing the employees; or

(2) Employees or independent contractors who entered into a valid contract to arbitrate prior to the Contractor bidding on a contract containing this clause, implementing Executive Order 13673. This exception does not apply:

(i) If the contractor is permitted to change the terms of the contract with the employee or independent contractor; or

(ii) When the contract with the employee or independent contractor is renegotiated or replaced.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in subcontracts that exceed $1,000,000. This paragraph does not apply to subcontracts for commercial items.

(End of clause)

■ 25. Amend section 52.244–6 by—

■ a. Revising the date of the clause;

■ b. Redesignating paragraphs (c)(1)(xiii) through (xv) as paragraphs (c)(1)(xv) through (xvii), respectively; and

■ c. Adding new paragraphs (c)(1)(xiii) and (xiv).

The revision and additions read as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (OCT 2016)

* * * * *

(c)(1) * * *

(xiii) 52.222–59, Compliance with Labor Laws (Executive Order 13673) (OCT 2016), if the estimated subcontract value exceeds $500,000, and is for other than commercially available off-the-shelf items.

(xiv) 52.222–60, Paycheck Transparency (Executive Order 13673) (OCT 2016), if the estimated subcontract value exceeds $500,000, and is for other than commercially available off-the-shelf items.

* * * * *

[FR Doc. 2016–19676 Filed 8–24–16; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR 2015–0051, Sequence No. 4]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–90; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2005–90, which amends the Federal Acquisition Regulation (FAR). An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding this rule by referring to FAC 2005–90, which precedes this document. These documents are also available via the Internet at *http://www.regulations.gov*.

DATES: August 25, 2016.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact the analyst whose name appears in the table below. Please cite FAC 2005–90 and the FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755.

RULE LISTED IN FAC 2005–90

Subject	FAR Case	Analyst
*Fair Pay and Safe Workplaces	2014–025	Delgado

SUPPLEMENTARY INFORMATION: Summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR case, refer to the specific item number and subject set forth in the document following this item summary. FAC 2005–90 amends the FAR as specified below:

Fair Pay and Safe Workplaces (FAR Case 2014–025)

DoD, GSA, and NASA are issuing a final rule amending the FAR to implement Executive Order (E.O.) 13673, Fair Pay and Safe Workplaces, amended by E.O. 13683, to correct a statutory citation, and further amended by an E.O. signed today to modify the handling of subcontractor disclosures and clarify the requirements for public disclosure of documents. E.O. 13673 is designed to improve contractor compliance with labor laws and increase efficiency and cost savings in Federal contracting. As E.O. 13673 explains, ensuring compliance with labor laws drives economy and efficiency by promoting "safe, healthy, fair, and effective workplaces. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government." The E.O. was signed July 31, 2014. The Department of Labor is simultaneously issuing final Guidance to assist Federal agencies in implementation of the E.O. in conjunction with the FAR final rule.

The E.O. requires that prospective and existing contractors on covered contracts disclose decisions regarding violations of certain labor laws, and that contracting officers, in consultation with agency labor compliance advisors (ALCAs), a new position created by the E.O., consider the decisions, (including any mitigating factors and remedial measures), as part of the contracting officer's decision to award or extend a contract. In addition, the E.O. creates new paycheck transparency protections, among other things, to ensure that workers on covered contracts are given the necessary information each pay period to verify the accuracy of what they are paid. Finally, the E.O. limits the use of predispute arbitration clauses in employment agreements on covered Federal contracts. Phase-ins: (1) From October 25, 2016 through April 24, 2017, the prime contractor disclosure requirements will apply to solicitations with an estimated value of $50 million or more, and resultant contracts; after April 24, 2017, the requirements apply to solicitations estimated to exceed $500,000, and resultant contracts. (2) The requirements apply to subcontractors starting October 25, 2017. (3) The decision disclosure period covers labor law decisions rendered against the offeror during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the offer, whichever period is shorter. (4) The paycheck transparency clause applies to solicitations starting January 1, 2017. There is significant impact on small entities imposed by the FAR rule.

Dated: August 10, 2016.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2016–19677 Filed 8–24–16; 8:45 am]

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Part III

Department of Labor

Office of the Secretary

48 CFR Parts 22 and 52

Guidance for Executive Order 13673, “Fair Pay and Safe Workplaces”; Final Guidance

DEPARTMENT OF LABOR

Office of the Secretary

48 CFR Parts 22 and 52

ZRIN 1290–ZA02

Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces"

AGENCY: Department of Labor.

ACTION: Final guidance.

SUMMARY: The Department of Labor (the Department) is publishing final guidance (the Guidance) to assist the Federal Acquisition Regulatory Council (the FAR Council) and Federal contracting agencies in the implementation of Executive Order 13673, Fair Pay and Safe Workplaces. Executive Order 13673 (the Order) contains new requirements designed to increase efficiency and cost savings in the Federal contracting process. By law, Federal agencies already must contract only with "responsible" sources. Among other directives, the Order provides explicit new instructions for Federal contracting officers to consider a contractor's compliance with certain Federal and State labor laws as a part of the determination of contractor "responsibility" that contracting officers presently must undertake before awarding a Federal contract. In addition, the Order directs the FAR Council to propose the rules and regulations necessary to carry out the Order and the Department to develop guidance to help implement the new requirements. In this final Guidance, the Department provides detailed definitions for various terms used in the Order and the FAR rule to categorize and classify labor law violations, and the Department provides a summary of the processes through which contracting agencies will assess a contractor's overall record of labor law compliance and carry out their other duties under the Order.

DATES: This final Guidance is being published simultaneously with the FAR Council's final rule. The final FAR rule is published elsewhere in this issue of the **Federal Register** and is effective on October 25, 2016. Contractors and Federal agencies may use this Guidance beginning August 25, 2016.

FOR FURTHER INFORMATION CONTACT: Stephanie Swirsky, Deputy Assistant Secretary for Policy, U.S. Department of Labor, Room S–2312, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–5959 (this is not a toll-free number). Copies of this final Guidance may be obtained in alternative formats (large print, Braille, audio tape or disc), upon request, by calling (202) 693–5959 (this is not a toll-free number). TTY/TDD callers may dial toll-free [1–877–889–5627] to obtain information or request materials in alternative formats.

SUPPLEMENTARY INFORMATION: The Department publishes this final Guidance to assist in the implementation of Executive Order 13673, Fair Pay and Safe Workplaces, dated July 31, 2014 (79 FR 45309, Aug. 5, 2014). Executive Order 13673 was amended by Executive Order 13683, December 11, 2014 (79 FR 75041, Dec. 16, 2014) to correct a statutory citation. The Order was further amended by Executive Order to modify the handling of subcontractor disclosures and clarify the requirements for public disclosure of documents.

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I. Background

Spending on Federal contracts has almost doubled since 2000, and it has substantially increased as a percentage of total Federal spending.[1] This increase has spurred new attention by Congress and the current administration to address inefficiencies and gaps in oversight of Federal contractors and subcontractors, including through investment in new information-technology systems and guidance for the Federal contracting officers who do the critical day-to-day work of managing billions of dollars in contracts. Executive Order 13673, Fair Pay and Safe Workplaces (the Order), is one of several of such initiatives intended to provide new information, tools, and guidance for contracting officers to better serve in their roles as gatekeepers for and stewards of Federal agency resources.

The Order reinforces current Federal procurement procedures. Existing law requires Federal agencies to contract only with "responsible" sources.[2] To implement this responsibility requirement, an agency contracting officer must make an affirmative determination of a contractor's responsibility before the contracting officer makes any contract award.[3] Under existing law, a contractor must have "a satisfactory record of integrity and business ethics" to be a responsible source.[4] To strengthen this requirement, the Order now instructs contracting officers to consider whether a contractor has a history of certain labor law violations within the last three years as a factor in determining if the contractor has such a satisfactory record.[5]

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[1] In 2000, total spending on Federal contracts was $276.9 billion; by 2012, that number had increased to $518.4 billion. *See* Cong. Budget Office, "Federal Contracts and the Contracted Workforce," Letter from Director Douglas Elmendorff 1, 4 (Mar. 11, 2015), Table 1, *available at https://www.cbo.gov/sites/default/files/114th-congress-2015–2016/reports/49931-FederalContracts.pdf.*

Numerous violations of applicable laws in the course of business operations should raise questions about a contractor's integrity and business ethics. Even the most limited definition of "business ethics" requires a business to obey the law.[6] Despite this fact, multiple studies conducted over the last two decades suggest that consideration of contractor labor law violations during the Federal procurement process has been the exception rather than the rule.

A. GAO Studies of Federal Procurement

In the mid-1990s, the congressional General Accounting Office (GAO), now known as the Government Accountability Office, issued two reports finding that Federal contracts worth billions of dollars had been awarded to companies that had violated the National Labor Relations Act (NLRA) and the Occupational Safety and Health Act (the OSH Act).[7] The GAO observed that contracting agencies already had the authority to consider these violations when awarding Federal contracts under the existing regulations, but were not doing so because they lacked adequate information about contractors' noncompliance.[8]

Over a decade later, with contracting expenditures escalating, the GAO again found a similar pattern. Looking at the companies that had the largest wage violations and workplace health-and-safety penalties from fiscal years 2005 to 2009, the GAO found that a surprisingly high percentage of those companies subsequently received Federal contracts.[9]

A 2013 report by the Senate Health, Education, Labor, and Pensions (HELP) Committee corroborated these findings. That report reviewed violations of the Fair Labor Standards Act (FLSA) and other laws enforced by the Department's Wage and Hour Division (WHD) and Occupational Safety and Health Administration (OSHA) between 2007 and 2012 and found that some 49 Federal contractors were responsible for 1,776 separate violations of these laws and paid $196 million in penalties and back wage assessments.[10] In 2012, those same companies were awarded $81 billion in Federal contracts.[11] Looking at the 100 largest wage and OSHA violations, the Committee found that 35 Federal contractors had violated both wage and safety-and-health laws.[12]

As the GAO had done 15 years earlier, the HELP Committee Report noted that contracting officers had the legal authority to consider labor law violations during the procurement process, but were not doing so. The Committee noted that contracting officers generally do not seek information regarding responsibility matters outside of the limited databases they are required by law to review.[13] And, even if they did have access to such information, the report found, contracting officers would be reluctant to act on it because of a lack of guidance regarding when labor law violations add up to an unsatisfactory record of integrity and business ethics.[14]

B. State and Local Responsible-Contracting Policies

During the decades in which the GAO and HELP Committee studies of Federal procurement were conducted, many State and local governments responded to similar challenges by incorporating labor standards into contracting policies.[15] Preaward screening for labor

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[2] 10 U.S.C. 2305(b); 41 U.S.C. 3703. This requirement dates to 1884. *See* Act of July 5, 1884, ch. 217, 23 Stat. 107, 109. The Federal Acquisition Regulation (FAR) contains a similar requirement. *See* FAR 9.103(a). The FAR can be found at title 48 of the Code of Federal Regulations. Citations in this Guidance to the FAR use format FAR [section] instead of 48 CFR [section].

[3] FAR 9.103(b). Agency "contracting officers" are the only Federal officials who can enter into and sign contracts on behalf of the Government. *Id.* 1.601. Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings. *Id.* 1.602–1(a). They also have the responsibility to ensure that all requirements of law, Executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met. *Id.* 1.602–1(b).

[4] 41 U.S.C. 113(4); FAR 9.104–1(d).

[5] *See* Order, sections 2(a)(ii) and (iii).

[6] *See* Milton Friedman, "The Social Responsibility of Business is to Increase Its Profits," New York Times Magazine (Sept. 13, 1970); *see also* Rob Atkinson, "Growing Greener Grass: Looking from Legal Ethics to Business Ethics, and Back," 1 U. St. Thomas L.J. 951, 969 (2004) ("A great deal of business ethics focuses on precisely this issue: What norms, beyond the minima of obeying the law and making a profit, govern what business managers should do?"). While court cases addressing the relationship between labor violations and "integrity and business ethics" are not common, the Comptroller General has, on occasion, concluded that the violation of various labor-related laws can support a finding of lack of integrity and business ethics. *See, e.g., ALM, Inc.,* B–225679 et. al, 87–1 CPD ¶ 493, at 1–2 (Comp. Gen. May 8, 1987) (discussing alleged violations of the Service Contract Act (SCA) in the context of FAR 9.104–1(d)); *Gen. Painting Co.,* B–219449, 85–2 CPD ¶ 530 at 4 (Comp. Gen. Nov. 8, 1985) (discussing failure to fulfill minimum wage requirements as a potential basis for nonresponsibility under FAR section 9.104–1(d)); *Wash. Moving & Storage Co.,* B–175845, 1973 WL 8012, at 2 (Comp. Gen. Mar. 9, 1973) (upholding NASA's debarment of contractor for failure to comply with labor laws).

[7] *See* U.S. General Accounting Office, GAO/HEHS–96–8, "Worker Protection: Federal Contractors and Violations of Labor Law," Report to Senator Paul Simon (1995) (documenting awards to companies that had violated the NLRA), *available at http://www.gao.gov/assets/230/221816.pdf*; U.S. General Accounting Office, GAO/HEHS–96–157, "Occupational Safety and Health: Violations of Safety and Health Regulations by Federal Contractors," Report to Congressional Requesters (1996) (documenting awards to companies that had violated safety-and-health regulations), *available at http://www.gao.gov/assets/230/223113.pdf.*

[8] *See* U.S. General Accounting Office, GAO/T–HEHS–98–212, "Federal Contractors: Historical Perspective on Noncompliance With Labor and Worker Safety Laws," Statement of Cornelia Blanchette before the Subcommittee on Oversight and Investigations, Committee on Education and the Workforce, House of Representatives, 2 (July 14, 1998) (drawing conclusions from the 1995 and 1996 GAO reports cited above in note 8), *available at http://www.gao.gov/assets/110/107539.pdf.*

[9] U.S. Government Accountability Office, GAO–10–1033, "Federal Contracting: Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors," Report to Congressional Requesters 7–8 (2010), *available at http://www.gao.gov/new.items/d101033.pdf.*

[10] Majority Staff of Senate Committee on Health, Education, Labor, and Pensions, "Acting Responsibly? Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk," 1 (2013) (hereinafter HELP Committee Report), *available at http://www.help.senate.gov/imo/media/doc/Labor%20Law%20Violations%20by%20Contractors%20Report.pdf.*

[11] *Id.*

[12] *Id.* at 18.

[13] *Id.* at 25.

[14] *Id.* at 27–28.

[15] *See* Paul K. Sonn & Tsedeye Gebreselassie, *The Road to Responsible Contracting: Lessons from States and Cities for Ensuring That Federal Contracting Delivers Good Jobs and Quality Services,* 31 Berkeley J. Emp. & Lab. L. 459, 464–87 (2010) (listing examples). In addition, responsible-contractor policies have been increasingly employed by private actors. As one safety consultant for a Fortune 500 company noted, "[i]n the long term, carefully selected contractors are amazingly superior to those chosen based on cost or supposed productivity. The front-end investment for careful selection delivers an ROI far beyond the cost to go through the 'dating-engagement-marriage' process." Mike Williamsen, "Choosing Great Contractors for Your Needs," Indus. Hygiene News (July/Aug. 2012), *available at http://www.rimbach.com/cgi-bin/Article/IHN/Number.idc?Number=559.* These sorts of long-term benefits also make responsible-contractor policies attractive to large pension funds, the largest of which, CALPERS, has had a responsible-contractor policy in place for almost 20 years. *See* California Public Employees' Retirement System, "Statement of Investment Policy for Responsible Contractor Program," 7, 16 (2015), *available at https://*

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law violations became standard practice in some State and local jurisdictions in the form of pre-qualification programs.[16] These programs have "come to be viewed in the public contracting field as a best practice and a key management strategy."[17] In North Carolina, for example, contractors must be prequalified to bid on projects for the State's Department of Transportation. As part of this prequalification, contractors have to disclose whether they have received any final or nonfinal repeat or willful OSHA violations within the past 2 years, and they must include copies of those violations with the prequalification application.[18]

Research tracking the results of these State and local efforts and of other similar Federal programs has suggested that responsible-contracting policies—including those policies that require payment of prevailing wages—can have a positive effect on contract performance, at limited cost and without negatively affecting competition. One recent study analyzed State and Federal highway-construction contracts in Colorado between 2000 and 2011 and found no statistically significant difference in the cost of the State projects, despite the additional prevailing-wage regulations on the federally financed projects.[19] The study found that the Federal regulations were "not associated with reduced bid competition, an important determinant of project cost."[20] Similarly, a study of local prevailing wage regulations in California in 2012 showed that the regulations "[did] not decrease the number of bidders nor alter the bidding behavior of contractors relative to the . . . value of the project."[21] And a recent study of the use of local responsible-contractor policies across the State of Ohio showed no statistically discernible impact on school construction bid costs.[22]

These studies have shown that strengthening procurement labor standards and contractor labor-law compliance policies can play an important role in appropriately managing competition in procurement. When correctly managed, competition between contractors can increase accountability and the quality of services provided.[23] However, where compliance with legal norms is weak, price competition alone may instead result in an increase in unlawful behavior and poor contract performance.[24] State and local responsible-contracting policies have shown that contracting agencies can improve the quality of competition by encouraging bids from more responsible contractors that might otherwise abstain from bidding out of concern about not being able to compete with less scrupulous corner-cutting companies.[25]

In sum, studies of State and local initiatives have shown that—by properly managing competition—responsible-contractor policies can deliver better quality without significant cost increases for government agencies that employ them.

The Fair Pay and Safe Workplaces Order applies lessons learned from these developments in State and local contracting policy, and, by doing so, addresses the longstanding deficiencies highlighted in the GAO reports.

II. Summary of the Executive Order

Executive Order 13673 (the Order) was signed by President Barack Obama on July 31, 2014. The Order contains three discrete parts, each designed to help executive departments and agencies identify and work with contractors who will comply with labor laws while performing Federal contracts.

The first part of the Order directs agency contracting officers to consider contractors' records of labor law violations as the agencies make certain contracting decisions. To assure that contracting officers have sufficient information, the Order requires contractors to disclose their recent labor law violations to contracting officers. Specifically, the Order requires contractors to disclose violations of 14 Federal labor laws and Executive orders and equivalent State laws (collectively, "Labor Laws"). The Order instructs contracting officers to review a contractor's Labor Law violations to assess the contractor's record of Labor Law compliance during the preaward "responsibility" determination and when making postaward decisions such as whether to exercise contract options. The Order also creates a new position—Agency Labor Compliance Advisors (ALCA)—to assist contracting officers.

The first part of the Order also contains parallel requirements that apply to certain subcontractors working on covered contracts. The Order, as amended, and the final FAR rule require these covered subcontractors to disclose their Labor Law violations to the Department, which provides advice regarding subcontractors' records of Labor Law compliance. Contractors then consider this advice from the Department when determining whether their subcontractors are responsible sources.

The second part of the Order creates new paycheck-transparency protections for workers on Federal contracts. This part, section 5 of the Order, contains two separate requirements. It requires contracting agencies to ensure that certain workers on covered Federal

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www.calpers.ca.gov/docs/policy-responsible-contractor-2015.pdf.

[16] Daniel D. McMillan, Erich R. Luschei, "Prequalification of Contractors by State and Local Agencies: Legal Standards and Procedural Traps," Constr. Law., Spring 2007, at 21, 22 ("Public owners in numerous states now view prequalification as a useful, if not essential, element to ensure successful completion of construction projects.").

[17] Sonn & Gebreselassie, *supra* note 15 at 477.

[18] North Carolina Dep't of Transp., Subcontractor Prequalification Form, 14 (2014), *available at https://connect.ncdot.gov/business/Prequal/Documents/Subcontractor%20Prequalification%20Form.pdf.* The States of California, Massachusetts, and Connecticut have similar programs applicable to a broad array of public works. *See* Sonn & Gebreselassie, *supra* note 15 at 474–76. Other examples include the Illinois Department of Transportation; the City of Los Angeles; the Los Angeles Unified School District; the Santa Clara County, CA, Valley Transportation Authority; and the statute authorizing the construction of the Atlanta Beltline. *Id.* at 476 (discussing policies of the Illinois Department of Transportation and the City of Los Angeles); McMillan et al., *supra* note 16 at 22 (discussing the Los Angeles Unified School District program); P'ship for Working Families, "Policy & Tools: Responsible Contracting," *http://www.forworkingfamilies.org/page/policy-tools-responsible-contracting* (last visited July 11, 2016) (discussing for the Santa Clara and Atlanta examples); *see also* 44 Ill. Admin. Code 650.240 (2006) (implementing prequalification for the Illinois Department of Transportation).

[19] Kevin Duncan, "The Effect of Federal Davis-Bacon and Disadvantaged Business Enterprise Regulations on Highway Maintenance Costs," 68 ILR Review 212 (2015).

[20] *Id.*

[21] Jaewhan Kim et al., "The Effect of Prevailing Wage Regulations on Contractor Bid Participation and Behavior," 54 Indus. Relations 874 (2012).

[22] C. Jeffrey Waddoups & David C. May, "Do Responsible Contractor Policies Increase Construction Bid Costs?," 53 Indus. Relations, 273 (2014). Similarly, studies of local living-wage policies have shown "only a modest impact on costs, if any." *See* Sonn & Gebreselassie, *supra* note 15 at 480. A study of Baltimore's 1994 living-wage policy, for example, found a contract cost increase of just 1.2 percent, lower than the rate of inflation. *See id.*

[23] *See* Kate Manuel, Cong. Research Serv., R40516, "Competition in Federal Contracting: An Overview of the Legal Requirements," 2–3 (2011) (discussing benefits and costs associated with competition in Federal contracting).

[24] *See, e.g.,* Melissa S. Baucus & Janet P. Near, "Can Illegal Corporate Behavior Be Predicted? An Event History Analysis," 34 Acad. Mgmt. J., 9, 31 (1991) ("If a firm's major competitors in an industry are performing well, in part as a result of illegal activities, it becomes difficult for managers to choose only legal actions, and they may regard illegal actions as a standard industry practice.").

[25] *See* Sonn & Gebreselassie, *supra* note 16 at 477, 480; *see also* Maryland Dep't of Legislative Servs., "Impact of the Maryland Living Wage," 10 (2008), *available at http://dlslibrary.state.md.us/publications/OPA/I/IMLW_2008.pdf* (finding that the average number of bidders for service contracts increased from 3.7 bidders to 4.7 bidders after Maryland's living-wage law took effect).

contracts and subcontracts receive a wage statement that that contains information concerning that individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay. It also instructs covered contractors and subcontractors to inform individuals in writing if the individual is being treated as an independent contractor, and not an employee.

The third part of the Order limits the use of pre-dispute arbitration clauses in employment agreements on covered Federal contracts.

The Order creates detailed implementation roles for the FAR Council, the Department, the Office of Management and Budget (OMB), and the General Services Administration (GSA). The FAR Council has the rulemaking responsibility to amend the Federal Acquisition Regulation (FAR) to implement the Order. Section 7 of the Order provides that the FAR Council will "propose such rules and regulations and issue orders as are deemed necessary and appropriate to carry out this order."

The Order instructs the Secretary of Labor (the Secretary) to, among other duties, develop guidance that defines certain terms in the Order. The Order directs the Secretary to define the categories of Labor Law violations that contractors must disclose (administrative merits determinations, civil judgments, and arbitral awards or decisions); identify the State laws that are equivalent to the 14 Federal labor laws for which violations must be disclosed; define the terms (serious, repeated, willful, and pervasive) that will be used to assess disclosed violations; consult with ALCAs as they carry out their responsibilities under the Order; and specify which State wage-statement laws are substantially similar to the Order's wage-statement requirement.

The Order also directs the Secretary to develop processes for regular interagency meetings, develop processes by which contracting officers and ALCAs may give appropriate consideration to determinations and agreements made by the Department and other enforcement agencies, develop processes by which contractors may enter into agreements with the Department or other enforcement agencies, and review and improve the Department's data collection systems.

The final Guidance document that follows this **SUPPLEMENTARY INFORMATION** contains a more detailed summary of the Order.

III. Overview of the Final Guidance

Consistent with its obligations under the Order, the Department issued its Proposed Guidance on May 28, 2015, on the same date that the FAR Council issued its proposed rule to implement the Order. See 80 FR 30548 (proposed FAR rule); 80 FR 30574 (Proposed Guidance). Both the Department and the FAR Council solicited public comment, and the initial written comment periods closed on July 27, 2015. In response to requests for additional time to comment, however, the Department and the FAR Council extended the comment periods through August 26, 2015. After reviewing and carefully considering all of the timely submitted comments, the FAR Council and the Department are now simultaneously publishing final versions of the rule and the Guidance.

The Proposed Guidance contained sections addressing the purpose and summary of the Order, including a discussion of the existing FAR framework and the legal authority for the Order; the disclosure requirements; weighing Labor Law violations; the paycheck transparency provisions; an invitation to comment; and next steps. The Department solicited written comments on all aspects of the Proposed Guidance and also invited public comment on a variety of specific issues.

In the final Guidance, the Department has made several significant adjustments to accurately describe the modifications that the FAR Council made to its rule. In addition, in response to the comments about topics specifically tasked to the Department, the Department has clarified various definitions of terms used in the Order and included a more detailed narrative of the process for disclosing, categorizing, and weighing labor law violations.

The final Guidance, which follows this **SUPPLEMENTARY INFORMATION**, has the same basic structure as the Proposed Guidance with some additional sections added for clarity. It contains the following sections: (I) Purpose and summary of the Order, (II) Preaward disclosure requirements, (III) Preaward assessment and advice, (IV) Postaward disclosure and assessment, (V) Subcontractor responsibility, (VI) Preassessment, (VII) Paycheck transparency, and (VIII) Effective date and phase-in of requirements.

This Guidance satisfies most of the Department's responsibilities for issuing guidance, and the Department will publish at a later date a second guidance that satisfies its remaining responsibilities. The second guidance will be, as this Guidance was, submitted for notice and comment, published in the **Federal Register**, and accompanied by a proposed amendment to the FAR rule. The Department will likewise submit for notice and comment and publish any future updates to the Guidance that will have a significant effect beyond the operating procedures of the Department or that will have a significant cost or administrative impact on contractors or offerors. The Department will coordinate with the FAR Council in determining whether updates will have a significant cost or administrative impact.

IV. Summary of Comments Received

The Department received 7,924 comments on the Proposed Guidance from a wide variety of sources. Among these comments, some 7,784 were in the nature of mass mailings expressing general support for the Order, the FAR Council's proposed rule, and the Department's Proposed Guidance (collectively "the Order and the proposals"). Another 30 comments were in the nature of form letters, most of which expressed general opposition to the Order and the proposals. The Department also received an additional 109 individual submissions.

As discussed above, the FAR Council is issuing the implementing regulations for the Order by amending the FAR. The FAR Council published its proposed rule on the same date as the Department published its Proposed Guidance and similarly extended the comment period on the proposed rule to August 26, 2015. The Department and the FAR Council have coordinated efforts to assure the comments submitted that are relevant to the Guidance or to the FAR rule are shared with the appropriate agency, regardless of which agency may have initially received any specific comment.

A wide variety of interested parties submitted comments on the Proposed Guidance. Commenters included Members of Congress; State executive agencies; individual Federal contractor entities; national and State-level employer associations and advocacy organizations; professional associations; labor union federations; worker advocacy organizations; civil rights and human rights advocacy organizations; other non-profit advocacy organizations; and the Small Business Administration's Office of Advocacy, among others.

The Department recognizes and appreciates the value of comments, ideas, and suggestions from all those who commented on the proposal, and the final Guidance was developed only after consideration of all the material submitted.

V. Discussion of General Comments

This section of the preamble to the final Guidance discusses the general comments that the Department received.

A. Comments Requesting Changes to the Order or the Proposed FAR Rule

Several industry commenters took issue with the text of the Order itself. In promulgating the Guidance and rule, the Department and the FAR Council are guided by the plain language of the Order. For example, several commenters argued that the FAR Council and the Department should change the contract value that will trigger the Order's disclosure requirements. Yet this $500,000 threshold comes from section 2 of the Order itself. Comments such as these are generally not addressed here.

Similarly, several commenters from both industry and worker-advocacy organizations took issue with requirements specific to the FAR Council's proposed rule, and not to the Guidance. The government's response to these comments will appear in the FAR Council's final rule. They are generally not addressed here.

B. Comments About Costs and Burdens of the Order

A number of employers and employer associations expressed concern that the requirements and processes established by the Order and the proposals will impose a heavy compliance burden that will increase their costs and cause delays in Federal contracting. Several of these industry commenters suggested that these potential costs and delays would harm the government and the public by increasing bid prices, discouraging companies from bidding on Federal contracts, or delaying the acquisition of key government goods and services.

Other commenters expressed general support for the Order and the proposals. Several argued that the disclosure requirements do not go far enough. These commenters suggested that contractors should be required to provide more information about each Labor Law violation than proposed by the Department, and argued that all of the information disclosed to contracting agencies should be compiled in a public, searchable database.

The Department recognizes that compliance with the Order's and the proposals' new requirements and processes will involve costs to contractors associated with the required representation and disclosures. These costs and burdens are addressed in the Regulatory Impact Analysis (RIA) that accompanies the final FAR rule. Accordingly, the Department does not specifically list and respond to each comment about costs and burdens in this final Guidance document. Likewise, comments asserting that the RIA in the proposed FAR rule was flawed are addressed by the FAR Council and therefore are not summarized or answered here.

C. Comments About Alternatives and the Need for the Order

Various industry commenters suggested that the Order and its requirements are unnecessary because any problems associated with Labor Law violations by Federal contractors can be addressed through existing rules and processes. Several commenters suggested that problems associated with Labor Law violations should be addressed in the existing suspension-and-debarment process instead of through the preaward responsibility process. Others suggested that the Order's disclosure requirements, specifically, are unnecessary because the government already obtains information about violations under the laws covered by the Order. These commenters argued that enforcement agencies already have the necessary information and that the disclosure requirements are duplicative of other reporting and information-gathering projects already in existence.

While these commenters have raised important issues, the Department does not believe that the Order is unnecessary or duplicative of existing processes. As an initial matter, the Department emphasizes that the purpose of the Order is to increase efficiency in contracting by encouraging compliance during contract performance, not to increase the use of suspension and debarment. The Order's new requirements and processes are designed to identify and help contractors address Labor Law violations and come into compliance before a contracting agency turns to the suspension-and-debarment process. The Order does not in any way alter the suspension-and-debarment process; however, the expectation is that its new requirements and processes will help contractors avoid the consequences of that process.

The Department believes that focusing on the preaward process—in addition to a functional suspension-and-debarment regime—is efficient for the government as well as for those contractors that are given the opportunity to avoid suspension or debarment. Without effective preaward screening, the government faces the difficult decision about whether to expend resources on suspending or debarring a company that may in fact not be planning to subsequently bid on a government contract.[26] And, as the chief construction inspector for the Los Angeles Bureau of Contract Administration has explained, front-end responsibility screening "is more effective and more beneficial to the public than a reactionary system. When you get a bad contractor on the back end, they've already done the damage, and then it's a costly process of kicking them out." [27]

Moreover, when one Federal agency suspends or debars a contractor, that action applies across the entire Federal Government. The collateral consequences—both for a debarred contractor and for other contracting agencies that may need the services of that contractor—can be severe.[28] Thus, while the suspension-and-debarment process plays an important role in addressing significant concerns regarding an entity's responsibility and has a broad-reaching impact,[29] the preaward framework employed by the Order is an equally important tool, one that allows responsibility concerns to be addressed on a procurement-by-procurement basis with attendant benefits to both the government and the contracting community.

Recognition of the benefits of early detection and prevention underlies the existing Federal procurement rules that require disclosure and consideration of various non-labor violations at the preaward stage. A bidder must disclose information such as tax delinquencies in excess of $3,500 and certain criminal convictions, indictments, civil judgments, and charges (for example, for violations of Federal or State antitrust statutes related to the submission of offers, commission of embezzlement, and making false statements); and a bidder with Federal contracts and grants totaling in excess of $10 million must additionally disclose information such as civil and administrative findings of fault and liability in connection with the award to or performance by the bidder of a Federal contract or grant.[30]

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[26] *See* Yuri Weigel, "Is 'Protection' Always in the Best Interests of the Government?: An Argument to Narrow the Scope of Suspension and Debarment," 81 Geo. Wash. L. Rev. 627, 660–61 (2013) (arguing that suspension and debarment are not always worth the administrative costs); HELP Committee Report, *supra* note 11 at 28–29 (discussing the inefficacies of the suspension and debarment process).

[27] Sonn & Gebreselassie, *supra* note 16, at 476–77.

[28] *See* Robert Stumberg et al., "Turning a Blind Eye: Respecting Human Rights in Government Purchasing," Int'l Corp. Accountability Roundtable, 39–40 (2014) *available at http://icar.ngo/wp-content/uploads/2014/09/Procurement-Report-FINAL.pdf*; *see also* John B. Warnock, "Principled or Practical Responsibility: Sixty Years of Discussion," 41 Pub. Cont. L.J. 881, 914 (2012) ("Government-wide debarment is punitive debarment to the extent that it disregards agencies' individual requirements and abilities to mitigate procurement risks.").

[29] In some cases, denying access to Federal contracts may in fact "be the only realistic means of deterring contractors from [labor violations] based on a cold weighing of the costs and benefits of non-compliance." *Janik Paving & Constr., Inc.* v. *Brock,* 828 F.2d 84, 91 (2d Cir. 1987) (holding that the Department had authority to debar a contractor over violations of the Contract Work Hours and Safety Standards Act).

By mandating preaward consideration of Labor Law violations, the Order does no more than treat such violations the same as these other existing responsibility red flags. By doing so, the Order will facilitate timely communication, coordination, and cooperation among Government officials—including contracting officers, suspending and debarring officials, and others—regarding responses to Labor Law violations to the fullest extent appropriate to the matter and permissible by law. By working together in this way, Federal Government agencies can better protect the government's interests in efficient contract administration and high-quality contract performance.

The Department also disagrees with the commenters that suggested the Order's disclosure requirements, specifically, are unnecessary and therefore unnecessarily burdensome. The Order's disclosure requirements are carefully tailored: It requires only a limited yes-or-no representation by all bidders and reserves the more detailed disclosure only for bidders for whom the contracting officer is making a responsibility determination—which most often is only the apparent awardee of the contract. The disclosure requirement is thus designed to request information from only those contractors for whom it is necessary in order for the contracting officer to assure that he or she is contracting with a responsible source, as required under existing law.

While some commenters stated that this disclosure requirement was unnecessarily burdensome, others found the Order's disclosure requirement to be appropriate. The National Employment Law Project, for example, argued that the contractor is "best positioned to furnish complete and accurate records about its labor violation." The Department finds this argument to be persuasive. The Order requires disclosure of various categories of information that the Federal Government does not have in its possession, including information about State law violations, private litigation, and arbitration. Contractors are the best source of this information.

In addition, the Order balances the disclosure requirement with a parallel instruction for the Department to review its own data collection requirements and processes, and to work with the Director of the Office of Management and Budget, the Administrator for the General Services Administration, and other agency heads to improve those processes and existing data collection systems, as necessary, to reduce the burden on contractors and increase the amount of information available to agencies. *See* Order, section 4(a)(iii). As noted in the Initial Regulatory Flexibility Analysis that was part of the proposed FAR rule, this review and the related improvement to Federal databases has been initiated, and the Department is confident that it will ultimately be successful in further reducing the disclosure burden associated with the Order's disclosure requirements. *See* 80 FR 30562. Until that time, however, the system of disclosure created under the Order is the most efficient and least burdensome method of making information about labor violations available to contracting officers. *See id.*

D. Comments About the Legal Authority for the Order

The Department received a number of comments challenging the legal authority upon which the Order and the proposals were issued. The commenters alleged that several provisions of the Proposed Guidance were contrary to Federal law and constitutional principles. The Department briefly summarizes those arguments and provides the following response:

1. The Procurement Act

Several industry commenters questioned the President's use of the Federal Property and Administrative Services Act (the Procurement Act), 40 U.S.C. 101 *et seq.*, as the legal authority for the Order. They argued that the Order and the proposals do not have the nexus to "economy and efficiency" in government procurement that courts have required for Executive action taken under the Procurement Act. The commenters argued that, instead, the Order will lead to higher procurement costs and a more burdensome procurement system. Commenters also questioned whether there is a relationship at all between labor law violations and poor contract performance.

After carefully reviewing these comments and the relevant case law, the Department disagrees with the commenters. The Order, the FAR rule, and this Guidance do not exceed the President's authority under the Procurement Act. The Procurement Act grants the President broad authority to prescribe policies and directives that the President considers necessary to carry out the statutory purposes of ensuring economical and efficient government procurement. The requisite nexus exists where the President's explanation for how an Executive order promotes efficiency and economy is reasonable and rational. As the Department discussed in the Proposed Guidance, the overall objective of the Order is to increase the government's ability to contract with companies that will comply with labor laws, thereby increasing the likelihood of timely, predictable, and satisfactory delivery of goods and services. The Department believes that agencies will benefit from additional information—through the new disclosure requirements—to better determine if a potential contractor is a responsible source.

The Order and the FAR rule provide ample basis for concluding that the goals of economy and efficiency in procurement are served. The RIA cites various studies showing a correlation between labor law violations and poor quality construction, low performance ratings, wasteful practices, and other performance problems.[31] And, by looking at contractors' recent violations of the law, Federal agencies can reasonably predict future behavior. As one academic study found, the existence of three or more prior violations of the law by a corporation is a "highly significant" predictor of subsequent illegal activity.[32] The President's explanation for how the Order promotes economy and efficiency is reasonable and rational. The final FAR rule and Department Guidance are therefore appropriate under the Procurement Act.

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[30] *See* FAR 52.209–5, 52.209–7.

[31] The Department notes that both a correlation and a causal relationship exist between labor law violations and contract performance. In predicting and explaining unlawful corporate behavior, many academic researchers have emphasized the problem, above all, of "top management in tolerating, even shaping, a corporate culture that allows for deviance." William S. Laufer, "Corporate Liability, Risk Shifting, and the Paradox of Compliance," 52 Vand. L. Rev. 1343, 1410–11 (1999) (citing various studies). Thus, in many cases, labor law violations and other harmful practices (such as contract fraud)—both of which cause poor contract performance—may all be symptoms of the underlying management failures or malfeasance.

[32] Baucus & Near, *supra* note 25 at 27.

2. Separation of Powers

Several commenters argued that the Order and the proposals impinge on separation-of-powers principles. These arguments were presented in two ways: (1) The Order is preempted by the Labor Laws, and (2) the Order improperly amends Federal laws by creating new categories of violations and imposing new penalties. Several commenters focused specifically on the NLRA, citing court decisions in *Wis. Dep't. of Indus.* v. *Gould, Inc.*, 475 U.S. 282 (1986), and *Chamber of Commerce* v. *Reich*, 74 F.3d 1322 (D.C. Cir. 1996).[33]

After careful review of the comments and the law, the Department concludes that the Order does not offend separation-of-powers principles. The Department disagrees with the commenters who suggested that traditional preemption principles apply to Federal Executive actions. Rather, the appropriate question is whether the Executive action under the Procurement Act conflicts with some more specific statute Congress has enacted. An Executive action may not prohibit activity that Congress has explicitly declared permissible, or vice versa. Here, however, the Order and proposals do neither.

The Department also disagrees with the characterization of the Order as creating new categories of violations or a new penalty—the possibility of being found nonresponsible and denied government contract work. The Order does not materially alter the current procurement process. As discussed above in the background section, contracting officers already may consider Labor Law violations when assessing a contractor's responsibility. Other than requiring disclosure of Labor Law violations, the Order does no more regarding the responsibility determination process than provide additional assistance to contracting officers to assist them in carrying out their existing duties.

The purpose of the existing FAR responsibility determination is to evaluate conduct that may be remediable or punishable under other statutes. Contractors are already required to report numerous types of conduct, including fraud, anti-competitive conduct, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, and tax delinquencies, that are unlawful and separately punishable under existing Federal and State laws. *See* FAR 52.209–5(a)(1)(i)(B)–(D). Such reporting and consideration does not create a new penalty under those statutes because the purpose of these FAR provisions is not to penalize a contractor, but rather to assure that the government contracts with responsible parties as it carries out its proprietary business. For the same reason, the Order's express consideration of the Labor Laws does not create new categories of violations or new penalties.

Finally, the Department disagrees that this analysis applies differently to the NLRA than to the other Labor Laws covered under the Order. Courts have upheld various Executive orders absent a direct conflict with the NLRA's statutory provisions. The decisions in *Gould* and *Reich* relied upon by the commenters do not suggest otherwise. Those two decisions involved initiatives that directly targeted only NLRA-covered violations. Moreover, the *Gould* decision did not involve a Federal Executive order, but rather a State law, and one that the Court found to have "the manifest purpose" of enforcing the requirements of the NLRA and which could not even "plausibly be defended as a legitimate response" to local procurement needs. 475 U.S. at 291. The *Reich* decision did involve an Executive order, but one which the court found to have the intent and effect of depriving contractors of the ability to hire permanent replacements during a strike—something that "promise[d] a direct conflict" with the NLRA. 74 F.3d at 1338. In both cases, the courts found that the provisions at issue were intended to affect the relationship between management and organized labor as opposed to seeking to advance a narrow proprietary interest with a close nexus to achieving economy and efficiency in Federal procurement. In contrast, here the Order endeavors only to treat the NLRA no differently than any of the other 13 covered Labor Laws. Thus, unlike in *Gould* and *Reich*, the inclusion of the NLRA in the Order here demonstrates the Order's intent to promote the government's proprietary interest in efficient contracting in an evenhanded manner.

3. Due Process

Many industry commenters expressed concern that that the Order and the proposals do not provide contractors with constitutionally sufficient due process protections. For example, two employer representatives argued that the Order and the proposals could infringe upon protected liberty interests because an adverse responsibility determination could harm a prospective contractor's reputation. Others argued that a contractor's protected property interests may be infringed where postaward violations lead to an adverse action such as the non-renewal of an option, contract termination, or debarment.

The Department agrees that the preaward responsibility determination, the exercise of postaward contract remedies, and the suspension-and-debarment process each require consideration of a contractor's right to due process. However, the Department emphasizes that neither the Order nor the Guidance diminish the existing procedural safeguards already afforded to prospective contractors during the preaward responsibility determination or to contractors after they have been awarded a contract. Moreover, the Order does not infringe upon liberty or property interests because contractors receive notice that the responsibility determination is being made and are offered a pre-decisional opportunity to be heard by submission of any relevant information—including mitigating circumstances related to any Labor Law violation that must be disclosed.[34] Finally, nothing in the Order diminishes contractors' post-decisional opportunity to be heard through existing administrative processes and the Federal courts.

Various commenters also challenged the Proposed Guidance's definition of administrative merits determinations, claiming that requiring contractors to report nonfinal and appealable allegations denies them due process. Commenters asserted that a contractor may feel pressured to negotiate or sign a labor compliance agreement and forgo a challenge to a nonfinal administrative merits determination in order to receive a pending contract.

The Department has carefully considered this argument, but does not believe that the specific requirement to disclose nonfinal administrative merits determinations violates contractors' rights to due process. Though the Order and FAR rule (and therefore the Guidance) place value on a contractor's effort to remediate violations through a settlement or labor compliance agreement, neither contains any requirement that a contractor must settle all open cases in order to be found responsible and receive a contract award—a fact that the Department has emphasized in the final Guidance. *See* Guidance, section III(B)(1)(a). Similarly, the final Guidance also emphasizes that a contractor may enter into a labor compliance agreement while at the same time continuing to contest an underlying Labor Law violation. *See id.* section III(C)(1). Because a contractor is not required to forgo the right to appeal any nonfinal Labor Law violation in order to secure a Federal contract, the requirement to disclose nonfinal violations clearly does not violate due process.

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[33] Various commenters also made a separation-of-powers type of argument about the Federal Arbitration Act (FAA) and the Order's limits on certain pre-dispute mandatory arbitration clauses. The Department is not providing guidance regarding that section of the Order and therefore does not address the legal arguments about the FAA. The FAR Council addresses FAA-related legal arguments in the preamble to its final rule.

[34] *See* FAR 22.2004–2(b)(1)(ii). Several commenters argued that the definition of administrative merits determination will be costly because it will force contractors to litigate a Labor Law violation in two separate fora—first, in front of the enforcement agency that has made the determination; and, second, by submitting mitigating circumstances to a contracting officer when submitting a bid. While mindful of the additional costs that this process may entail for some contractors, the Department submits that contractors' opportunity to provide relevant information (including mitigating circumstances) during the responsibility determination addresses the due process concerns raised by the employer associations.

4. The Administrative Procedure Act

Some commenters argued that the Guidance does not comply with the Administrative Procedure Act (APA), 5 U.S.C. 553(b). They asserted that the Guidance is, in effect, a legislative rule that requires notice and comment. The Department has reviewed these comments and finds them to be without merit. The Guidance is not a legislative rule; it does not bind private parties or agency officials, and it does not meet the four-part test for a legislative rule that would require notice and comment. *See Am. Mining Cong.* v. *Mine Safety & Health Admin.,* 995 F.2d 1106, 1109 (D.C. Cir. 1993).

First and foremost, the Order provides an independent and adequate basis for enforcement, apart from the Guidance. *See Am. Mining,* 995 F.2d at 1112. The Order and the FAR Council rule provide disclosure and process requirements that bind private parties and agency officials. The Guidance only supplies additional clarity to these requirements through the Department's interpretation of certain terms of the Order and narrative description of the process. Second, the Department has not explicitly invoked its general legislative authority. *See id.* Rather, it has acted to create a guidance document at the explicit instruction of the Order itself. *See* Guidance, section I(B). Third, the Guidance does not effectively amend the Order or any regulations; rather, it is consistent with their requirements. An agency action "does not, in this inquiry, become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted." *Am. Mining,* 995 F.2d at 1112. Finally, the Guidance will not be published in the Code of Federal Regulations. *See id.*

Moreover, even if the Guidance were considered to be a legislative rule, the Department met the APA's procedural requirements by publishing the Proposed Guidance in the **Federal Register** and soliciting and considering comments before issuing the final Guidance.

In another set of comments directed at procedural aspects of the Guidance, a few employer groups raised concerns that the impact of the Guidance could not be properly assessed because the Department decided to identify only a small number of the State laws equivalent to the 14 Federal laws listed in the Order and to leave the remaining State laws for a subsequent guidance document. One commenter also stated that the Proposed Guidance did not contain a sufficient justification for this two-step process, suggesting that the final Guidance cannot be upheld unless the Department provides appropriate reasons for delaying the identification of equivalent laws. The Department has reviewed these comments and finds that they are premature and without merit. The Department has identified in this Guidance that OSHA State Plans are equivalent State laws; but the Department has decided to delay the identification of additional equivalent State laws as part of the phase-in of the Order's requirements that will allow contractors and contracting agencies time to adjust to the new requirements. The comments also do not account for the fact that the additional guidance released in the future will also be submitted as a proposal with an opportunity for comment and accompanied by a proposed amendment to the FAR and a Regulatory Impact Analysis.

Finally, one employer advocacy group commented that the Order directs the Department to issue guidance regarding only a single portion of the paycheck transparency provision, which is the identification of substantially similar State wage-statement laws. This commenter, Equal Employment Advisory Council (EEAC), requested clarification regarding what authority the Department has for issuing the "guidance, binding or not, on the additional provisions of the paycheck transparency provision." The commenter misunderstands the reason that the Department addressed all aspects of the paycheck-transparency requirements in the Proposed Guidance. The Department intends the Guidance to be a stand-alone document that will be helpful to agency officials and contractors as they implement the requirements in the Order and the FAR rule. Accordingly, the Department has included in the final Guidance a description of the requirements of the Order and the FAR—regardless of whether the Order specifically required the Department to provide guidance on those specific provisions.

Section-by-Section Analysis

In addition to submitting general comments, commenters also commented on specific elements of the Proposed Guidance. The Department appreciates the effort from these commenters to carefully review the Order and the Proposed Guidance. The Department now modifies the final Guidance in response to those comments in a number of areas. The comments, responses, and modifications are summarized below in a section-by-section analysis.

I. Purpose and Summary of the Order

Section I of the Guidance is an introduction that explains the purpose of Executive Order 13673, briefly summarizes the legal authority for the Order and the existing FAR rules to which the Order applies, and recites a summary of the new requirements and processes contained in the Order. The subsection on legal authority specifically identifies the Procurement Act, 40 U.S.C. 101 *et seq.,* as providing the statutory authority for the Order.

The Department received a number of comments questioning whether the Order would achieve its stated purpose of increasing economy and efficiency in Federal procurement, and—as a related matter—whether the President was justified in issuing the Order under the Procurement Act. As discussed above, the Department disagrees with those commenters that have questioned the purpose of and authority for the Order. The Department therefore concludes that it is not necessary to amend this section in response to these comments. The Department does, however, amend section I of the final Guidance to include the discussion of the purpose of the Order previously included in another section of the Proposed Guidance, to conform the summary to changes made to the FAR rule, to add language reiterating that the Guidance is not a legislative rule, and to improve its clarity.

II. Preaward Disclosure Requirements (Formerly "Disclosure Requirements")

During both the preaward and postaward periods, the Order requires contractors and subcontractors (collectively, "contractors") to disclose administrative merits determinations, civil judgments, and arbitral awards or decisions rendered for violations of the Labor Laws (collectively, "Labor Law decisions").[35] Section II of the Guidance assists agencies in interpreting the preaward disclosure requirements in the Order and the FAR rule.[36] Because the FAR rule governs the requirements discussed below, the Department has modified the Guidance to parallel changes made in the final FAR rule and has included additional descriptions of the rule's requirements to assist contractors and contracting agencies.

A. Covered Contracts (Formerly "Who Must Make Disclosures Under the Order")

The first part of section II of the Guidance discusses the types of contracts covered by the Order and the scope of a contractor's requirement to disclose Laboe Law decisions. These types include contracts between Federal agencies and prime contractors that meet certain conditions (covered procurement contracts). And they include subcontracts that meet similar, but not identical, conditions (covered subcontracts). The Guidance uses the term "covered contract" to refer to both covered procurement contracts and covered subcontracts.

The Department received several comments requesting that the definition of the various types of covered contracts be amended. One industry commenter, the Aerospace Industries Association (AIA), suggested that all commercial item contracts—and especially commercial item subcontracts—should be excluded from the Order's disclosure requirements. AIA noted that the Order does expressly exclude subcontracts for commercially available off-the-shelf items (COTS), and it asserted that there is no basis for distinguishing between contracts for COTS items and contracts for commercial items. It noted that there is a "major government initiative" to increase government acquisition of commercial items.

The Department declines to amend the Guidance as suggested. The definition of covered contracts is within the jurisdiction of the FAR Council. As the FAR Council indicates in the preamble to its final rule, the plain language of the Order does not provide for a blanket exclusion of commercial item contracts, which are distinct from COTS contracts in the FAR. The Order expressly excludes contracts for COTS items from covered subcontracts, *see* Order, section 2(a)(iv), and does not specifically address commercial items. Had the Order intended to also exclude contracts for commercial items, it would have done so expressly. The Guidance thus adopts the proposed definitions of "covered procurement contracts," "covered subcontracts," and "covered contracts;" and the Department has added additional language to highlight the applicability of the Order to procurement contracts for both COTS and commercial items.

The Department also received multiple comments about the definition of a "contractor" in this section. The Proposed Guidance explained that references to "contractors" include both individuals and entities and both offerors on and holders of contracts. Several employer organizations asked the Department to clarify whether this definition of "contractor" requires parties bidding on or holding covered contracts to disclose the violations of their parent corporations, subsidiaries, or affiliates. One commenter, the U.S. Chamber of Commerce, suggested that the Guidance the term contractor be limited to mean "the entity that legally executes a contract with the Government" and should not include "affiliated legal entities." Another commenter, the Society for Human Resource Management et al., recommended that disclosure be at the Commercial and Government Entity (CAGE) Code level because it would be less burdensome and because any alternative would not be reasonably related to the responsibility of the "specific entity that will perform the federal contract." Other industry commenters requested clarity on which entity is obligated to report the violations of affiliated entities after acquisitions, spinoffs, and mergers occur and any violations that occurred at facilities no longer in use.

In contrast, union and worker-advocacy organizations suggested that the Guidance define "contractor" to expressly include a contractor's affiliates and/or recommended that the Guidance otherwise require contractors to report the Labor Law violations of their affiliates. Some recommended that the Guidance use the FAR definition of "affiliates" at FAR 2.101, which defines "affiliates" in the context of direct or indirect control of an entity or business.

The Department declines to amend the definition of "contractor" in the final Guidance. The applicability of the Order's disclosure requirements to a contracting entity's corporate affiliates is within the jurisdiction of the FAR Council. As the FAR Council indicates in the preamble to its final rule, the scope of prime contractor and subcontractor representations and disclosures follows the general principles and practice of the FAR that are the same for other FAR provisions requiring representations and disclosures. The requirement to represent and disclose applies to the legal entity whose name and address is entered on the bid/offer and that will be legally responsible for performance of the contract. Consistent with current FAR practice, representations and disclosures do not apply to a parent corporation, subsidiary corporation, or other affiliates, unless a specific FAR provision (*e.g.,* FAR 52.209–5) requires that additional information. The Department additionally notes that the Order's disclosure requirements do not amend the existing FAR provisions regarding the relationship between a contractor's affiliates and its responsibility. The FAR continues to require contracting officers to consider all relevant information when reviewing a contractor's responsibility—including the past performance and integrity of a contractor's affiliates when they affect the prospective contractor's responsibility. *See* FAR 9.104–3(c).

The Department also received comments specifically directed at "covered subcontracts." In the final Guidance, the Department created a new section dedicated specifically to subcontractor responsibility. *See* Guidance, section V. The comments about subcontract coverage are addressed in a parallel section of the section-by-section analysis below.

B. Labor Law Decisions (Formerly "What Triggers the Disclosure Obligations")

The second part of section II discusses the categories of Labor Law decisions that contractors must disclose. The Order requires contractors to disclose Labor Law decisions rendered against them within the preceding 3-year period for a violation of the Labor Laws. *See* Order, sections 2(a)(i), 2(a)(iv)(A). The Proposed Guidance interpreted the relevant 3-year period to be the 3-year period preceding the date of the offer, contract bid, or proposal. 80 FR 30574, 30578. Labor Law decisions rendered during that 3-year period must be disclosed even if the underlying unlawful conduct occurred more than 3 years prior to the date of the report. *See id.* The Proposed Guidance further explained that contractors must disclose Labor Law decisions that were issued during the relevant 3-year period even if they were not performing or bidding on a covered contract at the time of the decision. *Id.* at 30578–79.

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[35] The Department has made several nonsubstantive changes to the Guidance in the disclosure section for clarity. The final Guidance now uses "contractors" to refer to both prime contractors and subcontractors; where relevant, however, the distinction between prime contractors and subcontractors is noted. In addition, the Guidance now refers to a contractor's requirement to provide information as "disclosure" instead of "reporting." This change is intended only for consistency with the language of the FAR rule.

[36] The Department has summarized the FAR's rules on postaward disclosures and assessment in section IV of the Guidance. The comments regarding the postaward process are discussed in a parallel section below.

Timing of the Initial Representation Requirement

The FAR Council proposed rule provided that, consistent with the Order, all "offerors" must initially represent at the time of their bids whether they have decisions that must be disclosed. *See* 80 FR 30552. One industry commenter proposed that only the contractor selected for an award of the contract should have to make the initial representation required by the Order. The FAR rule reasonably creates a two-step process requiring an initial representation equivalent to "yes or no." *See* FAR 22.2004–1(a). And only contractors for whom a contracting officer will initiate a responsibility determination must make more detailed disclosures. *Id.* This staggered process provides an appropriate balance by requiring detailed disclosures only from offerors for whom the contracting officer is conducting a responsibility determination.

The 3-Year Disclosure Period

Several commenters addressed the 3-year disclosure period. For example, the Aerospace Industries Association (AIA) argued that, at least with respect to administrative merits determinations, "only those determinations based on conduct that occurred or ceased within the prior three years" should be disclosed. However, the Order states that contractors must disclose violations "rendered against" the contractor within the 3-year disclosure period. Order, sections 2(a)(i), 2(a)(iv)(A). This language clearly refers to the date of the Labor Law decision, as opposed to when the underlying conduct occurred. The final Guidance includes an additional example to illustrate this principle.

The Council of Defense and Space Industry Associations (CODSIA) requested that the period of coverage for the disclosure requirements be reduced to 6 or 12 months. The plain language of the Order provides for a 3-year disclosure period, *see* Order, section 2(a)(i); thus it is not possible to permanently reduce the disclosure period. However, as described in section VIII of the Guidance and the corresponding section of the section-by-section analysis below, the final FAR rule phases in the disclosure period so that the full 3-year period will not be fully effective until October 25, 2018.

Proposal To Add Labor Laws

Some commenters suggested requiring disclosures for violations of statutes other than the enumerated Labor Laws. For example, the United Food and Commercial Workers International Union (UFCW) proposed adding "the anti-discrimination provisions of the Immigration and Nationality Act as amended by the Immigration Reform and Control Act of 1986 which are codified at [8 U.S.C. 1324b]." Two labor union commenters urged the Department to require disclosure of safety-and-health violations under statutory authority separate from the OSH Act, such as the Atomic Energy Act, 42 U.S.C. 2282c.[37]

The Department declines to adopt these proposals. The Order specifically identifies 14 Federal laws and Executive orders for which violations must be disclosed. Order, section 2(a)(i)(A)–(N). The Department cannot alter the list of laws covered by the Order.

Disclosure of Criminal Violations

The Center for American Progress Action Fund (CAPAF) requested clarification as to whether the Order requires disclosure of criminal violations of the Labor Laws, as the FLSA, the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), and the OSH Act provide for criminal sanctions. CAPAF is concerned that, if not, there would be a "significant loophole."

The Department declines to modify the final Guidance in response to this comment. The Order does not reference criminal violations of the Labor Laws. The Order requires disclosure only of a civil judgment, arbitral award or decision, or administrative merits determination, and a criminal conviction is not encompassed within those terms.[38]

OSHA State Plans

The Order directs the Department to define the State laws that are equivalent to the 14 identified Federal labor laws and Executive orders. Order, section 2(a)(i)(O). The Proposed Guidance stated that OSHA-approved State Plans are equivalent State laws for purposes of the Order's disclosure requirements because the OSH Act permits certain States to administer OSHA-approved State occupational safety-and-health plans in lieu of Federal enforcement of the OSH Act. *See* 80 FR 30574, 30579.

Several commenters addressed the inclusion of OSHA-approved State Plans as equivalent State laws. One labor organization commenter agreed that State Plans are equivalent to the OSH Act, as the State Plans function in lieu of the OSH Act in those States, and the National Council for Occupational Safety and Health (National COSH) called it "essential" to the Order's purpose that both the OSH Act and "its state law equivalents" be included.

In contrast, the U.S. Chamber of Commerce argued that the State Plans are not equivalent State laws. The Chamber noted that while State Plans must be "at least as effective" as the Federal OSHA program,[39] substantial differences nevertheless exist, because some State Plans "impose requirements . . . that are not required by, or differ from, federal law."

The Department declines to modify this aspect of the Proposed Guidance. As an initial matter, the Department interprets the Chamber's comment to suggest that a State law must be identical to be considered "equivalent" under the Order. The Department notes that other commenters emphasized that "equivalent" does not equate to "identical." The Department agrees with these commenters; requiring equivalent State laws to be identical would be underinclusive because State laws are rarely if ever identical to Federal laws.

The Department finds State Plans to be equivalent to the OSH Act because they perform the same functions as OSHA—setting standards, conducting enforcement inspections, and issuing citations. OSHA has only limited enforcement authority in those twenty-two States with State Plans, so failing to include OSHA State Plans as equivalent State laws would lead to a gap in disclosure for safety-and-health violations in those States under the Order. Including the State Plans results in a more level playing field than would excluding them. For these reasons, the Guidance adopts the inclusion of OSHA-approved State Plans as equivalent State laws. The Guidance now also includes additional resources about State Plans and a link to a list of OSHA-approved State Plans on the OSHA Web site.

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[37] Although the Order does not require the disclosure of violations of other Federal occupational safety-and-health statutes, such violations may be otherwise considered during the contracting process. For example, a contractor may bid on a Department of Energy contract for which the work will be covered by the Atomic Energy Act rather than the OSH Act. Such a contractor, however, may be performing work, or has performed work, that is covered by the OSH Act for another government agency or in the private sector. It is clear from the plain terms of the Order that a contractor, when bidding on a contract, must disclose any violations of the OSH Act, even if the work for which the contractor is bidding will not be covered by the OSH Act.

[38] While disclosure of criminal convictions is not required under the provisions of the Order, the Department notes that the FAR does require contractors to disclose criminal convictions in certain circumstances. *See* FAR 52.209–7.

[39] *See* Section 18(c) of the OSH Act, 29 U.S.C. 667 (c).

Disclosure of All Relevant Violations

Several industry commenters objected to disclosing Labor Law violations where the underlying conduct did not occur in the course of performance of a Federal contract. In contrast, several employee-advocacy groups supported requiring contractors to disclose Labor Law violations regardless of whether the violation arose from the performance of a Federal contract.

The Order's disclosure requirement does not distinguish between violations committed during performance of a Federal contract and those that are not. *See* Order, sections 2(a)(i), 2(a)(iv)(A). The Order aims to incorporate the full picture of a contractor's Labor Law compliance into the responsibility determination process. A contractor's past performance—whether in the course of performing a Federal contract or not—is an indicator of the contractor's future performance.[40] It is also relevant to a determination of the contractor's integrity and business ethics. The existing responsibility determination process already requires contractors to disclose unlawful conduct that may not have occurred during work on government contracts. FAR 52.209–5(a)(1)(i)(B)–(D). Thus, contractors must disclose any Labor Law decision issued for a violation of the Labor Laws, even if the violation was not committed in the performance of work on a Federal Government contract or subcontract. Because some commenters thought this was not clear in the Proposed Guidance, the Department modifies the Guidance for clarity.

Violations Related to Actions or Omissions of a Federal Agency

Several industry commenters suggested that contractors should not be required to disclose Labor Law violations that result from actions or omissions of the contracting agency. For example, two such commenters cited a wage violation resulting from the failure of the contracting agency to include the applicable clause or wage determination in the contract. Furthermore, although one trade association commenter and one advocacy organization commenter acknowledged that the Proposed Guidance would allow contractors to present additional information and mitigating factors along with the disclosed violation, they expressed concern that the information will not be properly evaluated.

The Department declines to adopt the proposed changes to the Guidance. It recognizes that some Labor Law violations may result where a Federal contract did not include a required clause or wage determination. Whatever the reason for the failure to include the required clause or wage determination, a violation still occurred. *See, e.g.,* 41 CFR 60–1.4(e) (stating that the Executive Order 11246 equal opportunity clause "shall be considered to be a part of every [covered] contract . . . whether or not it is physically incorporated in such contracts"). Thus, the Department believes the better approach is to take this information into account as a mitigating factor, rather than to make exceptions to the disclosure requirements.

The Proposed Guidance was clear that contractors are encouraged to submit any additional information they believe may be helpful in assessing the violations at issue—particularly mitigating information. The Proposed Guidance stated that mitigating factors can include situations where the findings of the enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor acted in good faith and had reasonable grounds for believing that it was not violating the law. 80 FR 30574, 30591. As discussed below, the Guidance lists "good faith and reasonable grounds" as a mitigating factor that weighs in favor of a recommendation that a contractor has a satisfactory record of Labor Law compliance. That discussion specifically provides the example of a situation where a violation is caused by the failure of a contracting agency to include a required clause in the contract.

Disclosure of "Relatively Minor" Violations

The Association of General Contractors (AGC) suggested that it is "burdensome and unfair" to require the disclosure of "relatively minor violations" that are not serious, repeated, willful, or pervasive as defined by the Department. Because only violations deemed serious, repeated, willful, or pervasive bear on the assessment of the contractor's integrity and business ethics, AGC recommended that only those violations should be disclosed.

The Department declines to adopt AGC's proposal. The Order plainly requires contractors to disclose all violations of the Labor Laws that result in Labor Law decisions. The disclosed violations are then classified as serious, repeated, willful, and/or pervasive—or not. *See* Order, sections 2(a)(i), 2(a)(iv)(A), 4(a)–(b). Only those violations classified as serious, repeated, willful, and/or pervasive will be considered as part of the weighing step and will factor into the ALCA's written analysis and advice. Violations determined by the ALCA to not be serious, repeated, willful, or pervasive will be annotated as such in the analysis that the ALCA provides to the contracting officer.

Disclosure of Violations That Are Subsequently Settled

Jenner & Block LLP commented that it was unfair to require disclosure of violations that have been settled, thus rendering them "potentially sanctionable[ ] event[s]." According to the comment, doing so would cause "the Federal government to violate its own contractual obligations" when there is a non-admission provision in the settlement agreement.

The Department declines to amend the Guidance's treatment of settled violations. The Order requires the disclosure of violations, and the fact that a violation was subsequently settled does not negate the fact that the enforcement agency, after a thorough investigation, found a violation to have occurred.

In some settlements, the enforcement agency may agree as part of the settlement to vacate a prior administrative merits determination. In such a case, the settlement would have the same effect as a court decision reversing or vacating the original violation. As the Guidance notes, in such a circumstance, the contractor does not need to disclose the original Labor Law decision. *See* Guidance, section II(B)(4).

Unless an enforcement agency has agreed to vacate or rescind the underlying violation entirely, however, the contractor must still disclose the related Labor Law decisions when required by the Order, notwithstanding any settlement agreement. A non-admission provision, for example, does not generally involve an enforcement agency's agreement to withdraw any finding of a violation. Thus, a non-admission provision does not affect the existence of any prior Labor Law decision, and therefore does not change the Order's requirement that a contractor must disclose any Labor Law decision that preceded the settlement. Similarly, an enforcement agency will not include, and an ALCA will not consider, language in a settlement agreement purporting to determine or affect whether a violation or related Labor Law decision must be disclosed under the Order.[41]

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[40] This principle is the same one a contractor uses when conducting a review of prospective subcontractors. A contractor would consider any prior misconduct or performance problems by the subcontractor, regardless of where the problems occurred and for which contractor the subcontractor was working at the time they occurred.

Although settlement agreements will not affect a contractor's disclosure requirements under the Order, a settlement agreement may be an important factor in the ALCA's overall assessment of the contractor's compliance record. The Order requires ALCAs to consider steps taken to correct the violation or improve compliance, and the Guidance accordingly provides that the remediation of a Labor Law violation through a settlement agreement is an important mitigating factor that can weigh in favor of a satisfactory record of Labor Law compliance. *See* Guidance, section III(B)(1).

Comments About Specific Subsections

The Order instructs the Department to define the three categories of Labor Law decisions that must be disclosed: "administrative merits determination," "civil judgment," and "arbitral award or decision." Order, section 2(a)(i).

1. Defining "Administrative Merits Determination"

In the Proposed Guidance, the Department described an administrative merits determination as including

> notices or findings—whether final or subject to appeal or further review—issued by an enforcement agency following an investigation that indicates that the contractor or subcontractor violated any provision of the Labor Laws.

80 FR 30574, 30579–80.

The Department defined "enforcement agency" as including the Department and its agencies—OSHA, WHD, and the Office of Federal Contract Compliance Programs (OFCCP). Enforcement agencies also include the Occupational Safety and Health Review Commission (OSHRC); the Equal Employment Opportunity Commission (EEOC); the National Labor Relations Board (NLRB); and certain State agencies.

The Department identified the specific notices and findings issued by these agencies that are administrative merits determinations. The Department provided that administrative merits determinations also include "a complaint filed by or on behalf of an enforcement agency with a Federal or State court, an administrative judge, or an administrative law judge alleging that the contractor or subcontractor violated any provision of the Labor Laws," and "any order or finding from any administrative judge, administrative law judge, the Department's Administrative Review Board [(ARB)], the [OSHRC] or State equivalent, or the [NLRB] that the contractor or subcontractor violated any provision of the Labor Laws." 80 FR 30574, 30579–80. This list of notices, findings, and documents was an exhaustive one.

a. Inclusion of Nonfinal and Appealable Decisions

A number of industry commenters objected on due process and related grounds to the inclusion of nonfinal and appealable decisions in the definition of "administrative merits determination." These commenters characterized such determinations as "allegations." One form comment submitted by various employers and employer groups asserted that requiring disclosure of nonfinal agency actions could cause contractors to lose a contract because of cases that are not yet fully adjudicated. The form comment stated that this would infringe upon Federal contractors' due process rights.

These commenters also argued that the notices, findings, and documents identified as administrative merits determinations in the Proposed Guidance often reflect mistakes by the enforcement agencies and/or are often reversed or settled, and that requiring disclosure of nonfinal and appealable determinations assumes that contractors are guilty until proven innocent. One form comment asserted that a number of the proposed administrative merits determinations are "routinely overturned once the initial determination is challenged." A few of these commenters asserted that the disclosure of "nonfinal allegations" may cause economic and reputational harms to contractors, particularly if the reported violation is later reversed.

For these commenters, administrative merits determination should include only final and adjudicated agency decisions. Jenner & Block, in a representative comment, suggested that only "final decision[s] of administrative bodies with quasi-judicial authority" should be administrative merits determinations. These commenters suggested that such a limit might include only decisions of administrative bodies such as OSHRC or the ARB, and those decisions of individual administrative law judges that are not appealed and therefore become final agency actions.

Several commenters, including the Society for Human Resource Management, the Council for Global Immigration, and the College and University Professional Association for Human Resources, also noted that the FAR Council's "Contractor Responsibility" rulemaking in 2000,[42] which was later rescinded, would have required the reporting of "adverse decisions by federal administrative law judges, boards or commissions" but not "preliminary agency assessments." One industry commenter asserted that the FAR Council previously rejected the notion that nonfinal allegations should influence the procurement process.

In contrast, union and worker-advocacy commenters supported the scope of agency determinations included in the proposed definition of administrative merits determination. For example, Change to Win (CTW) emphasized its strong support for including initial agency findings in the responsibility inquiry because, otherwise, violations would go undisclosed while "awaiting the outcome of potentially and often frivolous employer challenges to such findings and orders." Another commenter, North America's Building Trades Unions (NABTU), explained that:

> [t]he fact that a government enforcement agency has decided, after conducting an investigation, to pursue a citation, complaint or other action against a contractor is a signal of potential serious problems that could go unreported if the contractor were permitted to wait until the case is completely adjudicated—a process that can take years[.]

The Department believes that the due process and related critiques of the proposed definition of administrative merits determination are unwarranted. The Order delegates to the Department the authority to define the term. *See* Order, section 2(a)(i). The proposed definition is consistent with the Order and the authority delegated. The Department limited the definition to a finite number of findings, notices, and documents—and only those issued "following an investigation by the relevant enforcement agency.'' 80 FR 30574, 30579.

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[41] Nor will an enforcement agency include, or an ALCA consider, language in a settlement agreement purporting to determine how a violation will be classified under the Order (*e.g.*, language stating that, for the purposes of the Order, the violation was not serious, willful, repeated, or pervasive).

[42] Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 65 FR 80256 (Dec. 20, 2000).

If the Department limited its definition of administrative merits determination solely to findings of an ALJ, board, or commission, then thousands of uncontested enforcement agency determinations that Labor Laws have been violated would go undisclosed. For example, most WHD determinations that the FLSA's minimum wage and/or overtime provisions have been violated are never contested before an adjudicative body; rather, they are resolved prior to any litigation by the employer agreeing to pay the back wages reflected in a WH–56 form. Likewise, 89.1 percent of citations issued by OSHA between October 1, 2012 and September 30, 2015 were not contested or were settled using OSHA's informal settlement agreements or expedited informal settlement agreements.[43] And, at the NLRB, the settlement rate for meritorious unlawful labor practices cases was 92.4 percent in fiscal year 2015.[44]

Moreover, a narrower definition of administrative merits determination would also exclude all those initial agency determinations that a contractor is actively contesting. Excluding these determinations would in many cases result in a particularly long delay between the prohibited conduct and the obligation to disclose. For example, contested OSHA citations frequently take years to become final. In the interim, a contractor with many OSHA citations could secure Federal contracts without any consideration of those citations. In addition, the assertion by some commenters that administrative merits determinations are routinely overturned is not the case. For example, in fiscal year 2015 the NLRB's litigation success rate before ALJs and the Board was 88 percent, and 80 percent of Board decisions were enforced in whole or in part by courts of appeals.[45] An even smaller percentage of all OSHA citations—less than 2 percent—are later vacated.

The definition of administrative merits determination simply delineates the scope of contractors' disclosure obligations—the first stage in the Order's process. Not all disclosed Labor Law decisions are relevant to a recommendation regarding a contractor's integrity and business ethics. Only those that involve violations classified as serious, repeated, willful, and/or pervasive will be considered as part of the weighing step and will factor into the ALCA's written analysis and advice.[46] Moreover, when disclosing Labor Law decisions, a contractor has the opportunity to submit all relevant information it deems necessary to demonstrate responsibility, including mitigating circumstances and steps taken to achieve compliance with Labor Laws. *See* FAR 22.2004–2(b)(1)(ii). As the Guidance provides, the information that the contractor is challenging or appealing an adverse administrative merits determination will be carefully considered. The Guidance also states that Labor Law violations that have not resulted in final determinations, judgments, awards, or decisions should be given lesser weight. The Department believes that contractors' opportunity to provide all relevant information—including mitigating circumstances—and the Guidance's explicit recognition that nonfinal administrative merits determinations should be given lesser weight resolve any due process concerns raised by the commenters.

b. Specific Categories of Administrative Merits Determinations

In the Proposed Guidance, the Department enumerated an agency-by-agency list of notices, findings, and documents that will be considered to be administrative merits determinations. A number of commenters commented about these agency-specific lists.

WH–56 Summary of Unpaid Wages Form

The Proposed Guidance identified several types of documents issued by WHD, including a WH–56 ''Summary of Unpaid Wages'' form (WH–56 form), as administrative merits determinations. *See* 80 FR 30574, 30579. Several industry commenters objected to the inclusion of the WH–56 form as an administrative merits determination. For example, one commenter, SAIC, stated that a WH–56 form is ''not an admission of liability'' but ''a mechanism of settlement to resolve conflicts arising out of the investigation, and has been used as a practical and effective means of resolving complaints short of the litigation process.'' Another commenter, Jenner & Block, argued that a WH–56 form is ''not a 'merits determination' at all,'' ''includes solely a list of names, dates, and dollars owed,'' and ''contains no description of the purported violation, and no findings regarding any investigation that may have preceded its issuance.'' And another commenter, Jackson Lewis LLC, asserted that WH–56 forms are regularly issued ''before the employer has been provided a full opportunity to refute the basis of alleged violations and/or back pay calculated by the DOL in connection with the alleged violation,'' and are issued in a ''speculative and inconsistent'' manner.[47]

The Department retains the WH–56 form as an administrative merits determination in the Guidance. WH–56 forms reflect WHD's determination that an employer violated one or more wage-and-hour laws and owes back wages. The WH–56 forms contain the specific amount of back wages due to each employee, the statute(s) violated, and the date(s) of the violation(s). WHD issues WH–56 forms only after an investigation—during which employers are given the opportunity to provide relevant information and articulate their legal position. Moreover, WHD's policy is to issue a WH–56 form only after the employer has been informed of the investigation findings, has been provided an opportunity to explain the reasons for the violation(s), has been advised of how to comply with the law(s) at issue, and, most importantly, has agreed to fully comply with the law(s) going forward. In almost every case when WHD issues a WH–56 form, there is no further violation determination by WHD, a court, or an ALJ; the WH–56 is almost always the final assessment of an employer's back wage liability. In 88.2 percent of cases concluded in fiscal years 2013 through 2015 in which WHD issued a WH–56 form after determining that a Labor Law was violated, the employer paid all or some (usually all) of the back wages due on the form.[48]

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[43] This information and additional information below regarding OSHA citations were compiled from citations issued by Federal OSHA offices (as opposed to by State agencies under OSHA-approved State Plans) and recorded in OSHA's Information System.

[44] NLRB, ''NLRB FY 2015 Performance and Accountability Report'' 36, *https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1674/14445%20NLRB%20PAR%202015%20v2_508.pdf*.

[45] *Id.* at 36, 58.

[46] In addition, contractors are encouraged to disclose the subsequent reversal or modification of Labor Law decisions, which will reduce the potential impact of any erroneous administrative merits determination.

[47] One commenter, Littler's Workplace Policy Institute, stated that the Department ''would require a contractor to report as an 'administrative merits determination' a FLSA letter determination from the Wage and Hour Division, yet the agency has vigorously argued that such letters do not constitute final agency action that a company can challenge.'' However, the Order does not indicate that the required disclosures be defined by reference to the Administrative Procedure Act. Rather, the Order requires the disclosure of ''administrative merits determinations'' and authorizes the Department to define that term.

[48] This information was compiled from data recorded in the Wage and Hour Investigative Support and Reporting Database maintained by WHD. When the employer does not pay back wages due, it may be because it is unable to pay or refuses

OSHA Citations

The Proposed Guidance identified several types of documents issued by OSHA, including citations, as administrative merits determinations. *See* 80 FR 30574, 30579. Some industry commenters opposed the use of OSHA citations as administrative merits determinations. For example, Jenner & Block, citing OSHA's regulations at 29 CFR 1903.14(a)–(b) and 1903.15(a), argued that "an OSHA citation is merely an 'alleged violation,' not a merits determination," and "is issued merely if an OSHA Area Director '*believes*' that an employer has violated an OSHA law or regulation, not after a 'determination' has been made" (emphasis in original). This comment emphasized that "when a contractor receives a citation, the employer has received very limited information about the enforcement agency's facts and legal position regarding the alleged violation . . . a citation is merely an allegation of violation of specified or general duty OSHA standards." Associated Builders and Contractors asserted that "most OSHA citations are routinely changed after investigation and negotiation between the employer and the investigating agency, resulting in a lesser fine or type of citation."

The Department retains the OSHA citation as an administrative merits determination in the Guidance. OSHA issues citations only after conducting inspections during which OSHA affords employers the opportunity to put forth their position. The OSHA regulations cited above simply recognize that, under the applicable administrative scheme, citations are not "final," may be contested, and are "alleged" until they are made final—either by OSHRC adjudication or because they were not contested. *See* 29 U.S.C. 659(a), (c). That does not mean that citations are not reasoned agency determinations that an OSH Act violation has occurred. Moreover, as the Supreme Court has recognized, OSHA citations can be entitled to deference:

> The Secretary's interpretation of OSH Act regulations in an administrative adjudication, however, *is* agency action, not a *post hoc* rationalization of it. Moreover, when embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress.

Martin v. *OSHRC*, 499 U.S. 144, 157 (1991) (citing 29 U.S.C. 658) (emphasis in original).

Furthermore, contrary to some commenters' claims, OSHA citations are rarely overturned. Of citations issued between October 1, 2012 and September 30, 2015, 89.1 percent were not formally contested and either became final under 29 U.S.C. 659(a) or were settled using OSHA's informal settlement agreements or expedited informal settlement agreements. Of those that were contested, over one-half (58.7 percent) have settled, and the vast majority (82 percent) of those settlements upheld at least part of the citation. Of those that did not settle, the citation was upheld in the vast majority (81.6 percent) of contested cases that have been resolved by an ALJ, OSHRC, or a court as of April 2016 (some contested cases from the time period are ongoing), more often than not without any reduction in penalty. Less than 2 percent of all of the citations issued during the time period have been vacated.

OFCCP Show Cause Notices

The Proposed Guidance identified "a show cause notice for failure to comply" issued by OFCCP as an administrative merits determination. *See* 80 FR 30,574, 30,579. OFCCP uses such notices to enforce the affirmative action and nondiscrimination rules in Executive Order 11246 and other laws.

Some industry commenters argued that OFCCP show cause notices should not be considered administrative merits determinations. For example, one commenter, Roffman Horvitz, objected to the inclusion of show cause notices because they are not "final agency determinations reviewable in the Federal courts under the Administrative Procedures Act." According to this comment, OFCCP issues show cause notices to contractors at the outset of audits if the contractor does not provide the requested information within an initial 30-day period. The commenter alleged that OFCCP "has become extremely reluctant to grant extensions of time" of that period and "approaches conciliation with a take-it-or-leave-it attitude."

Another commenter, DirectEmployers Association, stated that a show cause notice generally contains "alleged violations related to highly technical Affirmative Action Program drafting and recordkeeping issues, or a failure to engage in adequate outreach and recruitment of women and/or minorities." This commenter asserted that a "very small minority of the [show cause notices] that OFCCP issues may also contain allegations of unlawful discrimination (typically fewer than in 2 percent of all OFCCP audits)."

The same commenter also stated that "routine" show cause notices are issued "*prior* to . . . completion of the investigatory phase of the audit" and "prior to considering the contractor's response to the agency's preliminary investigative conclusions" (emphasis in original). According to this commenter, "oftentimes the alleged violations raised in [a show cause notice] are voluntarily withdrawn by OFCCP," "are resolved through conciliation, or are later dismissed by an administrative court."

The Department retains the OFCCP show cause notice as an administrative merits determination. OFCCP issues a show cause notice when it determines that a contractor has violated one or more of the laws under OFCCP's jurisdiction. *See* Federal Contract Compliance Manual, ch. 8D01 (Oct. 2014). OFCCP issues fewer than 200 show cause notices per year, and issues them after a substantial process. OFCCP typically issues show cause notices after it has investigated, made findings, issued a notice of violation,[49] given the contractor an opportunity to respond, considered any response from the contractor, and attempted to resolve the issue through conciliation. OFCCP may issue a show cause notice if a contractor fails, after being requested by OFCCP, to submit the affirmative action plans or other information that it is required by law to maintain. Contrary to the commenter's assertion, OFCCP gives a contractor multiple chances, including extensions of time, to provide the requested information; and it gives a contractor the opportunity to explain its position before issuing a show cause notice. OFCCP must, if other efforts are unsuccessful, issue show cause notices in those few circumstances when contractors refuse to comply with their legal obligations to provide information. These obligations are crucial to OFCCP's ability to enforce its laws and investigate potential violations. Indeed, OFCCP cannot determine whether there was in fact unlawful discrimination until it receives the plans or other information that the contractor is required by law to maintain and provide.

EEOC Letters and Actions

The Proposed Guidance identified "a letter of determination that reasonable cause exists to believe that an unlawful employment practice has occurred or is occurring" issued by the EEOC and "a civil action filed on behalf of the EEOC" as administrative merits determinations. *See* 80 FR 30574, 30579.

Several industry commenters objected. Some argued that reasonable cause letters are a preliminary action

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to pay, or for some other reason. When the employer does not pay, the Department may pursue further action, including litigation.

[49] Notices of violations are not administrative merits determinations under the Order.

and are not based on sound proof that a violation actually occurred. Some asserted that few reasonable cause findings result in a court complaint or an eventual judgment. Others noted that reasonable cause findings are often excluded as evidence in subsequent litigation because their prejudicial value outweighs their probative value.

The Department retains reasonable cause letters as a type of administrative merits determination. An EEOC reasonable cause determination reflects an assessment of a charge's merits: "that there is reasonable cause to believe that the charge is true," 42 U.S.C. 2000e–5(b), based on information obtained in the investigation, including that provided by the employer, *see* EEOC, "What You Can Expect After a Charge is Filed," *http://www.eeoc.gov/employers/process.cfm*. In fiscal year 2015, about 3.5 percent of charges filed with the EEOC resulted in reasonable cause determinations.[50] After making a reasonable cause determination, the agency transitions from its investigatory, fact-finding role to its role as a conciliator and, if conciliation efforts fail, the agency becomes a potential litigant with authority to file a lawsuit to protect the public interest, including to obtain relief for individuals harmed by the discriminatory practices on which reasonable cause was found. The agency does not revisit the reasonable cause determination in conciliation. Rather, the EEOC must try to "eliminate" the "alleged unlawful employment practice" through conciliation before it can sue. 42 U.S.C. 2000e–5(b).

That the EEOC decides to sue in a relatively small percentage of cases in which it has found reasonable cause has little to no bearing on the determinations' merits. A large portion of reasonable cause determinations are conciliated. *See* 42 U.S.C. 2000e–5(b) (describing the conciliation process). For example, in fiscal years 2014 and 2015 combined, the EEOC successfully conciliated 41 percent of its reasonable cause determinations. Because of limited resources, EEOC can file lawsuits in only a small proportion of cases where it finds reasonable cause. Rather, the EEOC decides which cases to litigate based on a range of factors, including "the wider impact the lawsuit could have on EEOC efforts to combat workplace discrimination." EEOC, "Litigation Procedures," *http://www.eeoc.gov/eeoc/litigation/procedures.cfm*. Thus, the Department concludes that it is appropriate to include EEOC reasonable cause letters as administrative merits determinations.

As mentioned above, the Proposed Guidance also included as an EEOC administrative merits determination "a civil action filed on behalf of the EEOC." 80 FR 30574, 30579. This was unnecessary because the Proposed Guidance generally identified complaints filed by or on behalf of enforcement agencies with courts as administrative merits determinations. The Department eliminates this redundancy in the final Guidance.

NLRB Complaints

The Proposed Guidance identified "a complaint issued by any Regional Director" of the NLRB as an administrative merits determination. 80 FR 30574, 30579. Several industry commenters opposed this proposal, arguing that such complaints are only allegations. For example, one such commenter, the Littler Workplace Policy Institute, characterized such complaints as being based on "investigatory findings without judicial or quasi-judicial safeguards." This commenter further argued that "[e]ven the [NLRB]'s own determinations are not self-enforcing, as section 10 of the NLRA makes clear, because only a court of appeals can enforce orders of the Board."

Industry commenters also asserted that a relatively low percentage of complaints issued by NLRB Regional Directors result in NLRB determinations, and that even fully litigated NLRB decisions are often overturned by courts of appeals. And commenters stated that the NLRB sometimes pursues legal theories that have been rejected by some U.S. Courts of Appeals, meaning a contractor could be forced to disclose a decision involving conduct that some courts have ruled does not amount to a violation. Others argued that they must purposefully violate the NLRA in certain circumstances in order to test the validity of the NLRB's certification of a representation election in Federal court.

The Department retains the definition of administrative merits determinations for NLRA violations as proposed. The Department disagrees with the premise of the industry commenters' comments. As discussed above, the fiscal year 2015 NLRB settlement rate was 92.4 percent, the litigation success rate of General Counsel complaints before ALJs and the Board was 88 percent, and 80 percent of Board decisions were enforced in whole or in part by Courts of Appeals. The Department also disagrees that NLRB complaints should not be disclosed because some employers may purposefully violate the NLRA to "test" the validity of an election. Disclosure is only the first step in the Order's process; when disclosing Labor Law decisions, contractors are encouraged to submit all relevant information, including mitigating factors.

Some labor organizations suggested that the definition of "administrative merits determination" should be expanded. These commenters advocated including as administrative merits determinations those NLRB General Counsel findings in which the General Counsel notifies employers that it will issue a complaint absent settlement. The Department considers this addition to be unwarranted. If the General Counsel does issue a complaint, the complaint itself will be an administrative merits determination that must be disclosed. Accordingly, the Department maintains the definition as proposed.

Complaints Filed With Courts or Administrative Agencies

The list of administrative merits determinations in the Proposed Guidance included "a complaint filed by or on behalf of an enforcement agency with a Federal or State court, an administrative judge, or an administrative law judge alleging that the contractor or subcontractor violated any provision of the Labor Laws." 80 FR 30574, 30579.

Several industry commenters criticized this category. One commenter, Jenner & Block, stated that a civil action "can *only* represent a set of allegations and can never be viewed as a determination on the merits" (emphasis added). Another commenter questioned whether the Department was justified in distinguishing between a government agency's complaint and a private litigant's complaint—as the latter was not included as an administrative merits determination.

The Department retains the Guidance as proposed. The distinction between complaints filed by an enforcement agency and complaints filed by private parties to initiate lawsuits is valid. Agencies pursue litigation only after fully investigating the case, soliciting the adverse party's position, and making efforts to resolve the matter. Thus, the filing of a complaint by an enforcement agency in court or before an administrative agency is an agency determination that the relevant law has been violated.[51] Moreover, the inclusion of court complaints filed by or on behalf of enforcement agencies is necessary because some of the most egregious violations of the Labor Laws found by agencies may be enforced only through court actions depending on the particular Labor Law's enforcement scheme.

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[50] The EEOC data in this paragraph and the following paragraph are available on the EEOC's Web site at *http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm*.

[51] Jenner & Block asserted that including "civil actions as reportable events directly conflicts with

Finally, while it is true that not every complaint filed by an enforcement agency succeeds, the Department reiterates that the definition of administrative merits determination is relevant only to the initial disclosure requirement. The definition simply determines the scope of contractors' disclosure obligations—the first step in the Order's process. Not all disclosed violations are relevant to contractors' integrity and business ethics; only those that are serious, repeated, willful, and/or pervasive will be considered as part of the weighing step and will factor into the ALCA's written analysis and advice.

Retaliation Violations

Several commenters representing labor and worker advocacy organizations advocated that the definition of "administrative merit determinations" include notices or findings of violations of the anti-retaliation provisions of the OSH Act, 29 U.S.C. 660(c) ("Section 11(c)"), and the FLSA, 29 U.S.C. 215(a)(3) ("Section 15(a)(3)"). These anti-retaliation provisions are vital components to the enforcement of the OSH Act and the FLSA, and the Department did not intend to exclude them. The relevant administrative merits determination for these anti-retaliation violations is a complaint filed on behalf of the agency in court. As discussed above, such complaints are included in the Guidance's definition of "administrative merits determination."[52]

In addition to such court actions, WHD also may issue determination letters finding retaliation in violation of FLSA section 15(a)(3). The Proposed Guidance incorrectly limited the residual category of administrative merits determinations to "a letter indicating that an investigation disclosed a violation of sections six or seven of the FLSA . . ."[53] To assure that WHD letters finding a retaliation violation will be disclosed, the Department has revised the Guidance to remove the phrase "of sections six or seven." Thus, a WHD determination letter finding *any* FLSA violation—not just minimum wage and overtime violations—is an administrative merits determination.

One commenter expressed concern that violations of the anti-retaliation provisions of the statutes enforced by the EEOC may not meet the definition of administrative merits determinations because it is possible that retaliation is not an "unlawful employment practice." The Department and the EEOC consider the phrase "unlawful employment practice" to include unlawful retaliation.

False Statement Violations Under the OSH Act

One commenter requested that the Guidance include violations of section 17(g) of the OSH Act, 29 U.S.C. 666(g), which prohibits knowingly making false statements in reports or other documents required to be maintained by the OSH Act, as violations that must be disclosed under the Order. False statement violations have only criminal sanctions under the OSH Act. *See id.* As discussed above, criminal convictions of the Labor Laws are not reflected in the administrative merits determinations, civil judgments, or arbitral awards or decisions that must be disclosed. The Department therefore declines to amend the Guidance as requested.

c. Settlements

Several commenters representing labor and worker advocacy organizations urged the Department to define administrative merits determination to expressly include settlements reached with an enforcement agency before the institution of legal proceedings, which would mean that contractor would be required by the Order to disclose any such settlements as "Labor Law decisions." Commenters argued that their proposal would address a concern that employers might repeatedly negotiate preemptive settlements with an enforcement agency during an investigation, and thus avoid the issuance of a Labor Law decision that would otherwise have to be disclosed. In such situations, according to these commenters, these employers' apparently clean records would not reflect their repeated unlawful conduct. Another commenter agreed that settlements should not be considered reportable findings of violation, but argued that they should nevertheless be disclosed as part of a responsibility determination. Another sought clarification whether a settlement reached prior to a complaint being filed must be disclosed under the Order.

The Department maintains the Guidance as proposed. Settlements are not administrative merits determinations, and therefore contractors are not required by the Order to disclose them. The Department believes that the inclusion of settlements as administrative merits determinations could serve as a disincentive against settlements. Settlements at the earliest possible stage of a dispute are often the ideal outcome for both employers and their employees and the most efficient outcome for contracting agencies, as early settlements generally include improved compliance with the Labor Laws. The Department also notes that most settlements of agency investigations or enforcement actions follow or are accompanied by a notice or finding from the agency that meets the definition of an administrative merits determination. For example, OSHA settlements usually include the affirmation of citations. Those citations are *themselves* administrative merits determinations that must be disclosed. Likewise, settlements of FLSA investigations are often accompanied by a WH–56 form indicating WHD's determination that back wages are due because of an FLSA violation. The WH–56 form is an administrative merits determination and must be disclosed. However, any settlement agreement itself is not an administrative merits determination and therefore need not be disclosed.

Although settlement agreements are not administrative merits determinations, a settlement including remediation of violations is considered to be a mitigating factor that the contractor may choose voluntarily to disclose. As a result, in cases where a settlement accompanies or follows a Labor Law decision that must be disclosed, the Department anticipates that contractors will voluntarily disclose the settlement because it is in the contractor's interest to show that it has remedied the violation. As discussed in the preaward assessment and advice section of the Guidance, remediation of a violation is the most important mitigating factor in the weighing

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the terms of the Order, which requires only 'civil *judgments'* to be reported." (emphasis added). However, the Order separately requires "administrative merits determinations" to be disclosed, and for the reasons explained above, a complaint filed by an enforcement agency in court or before and administrative agency is an administrative merits determination even though it is not a civil judgment.

[52] This would also cover the OSHA-approved State Plans that enforce their equivalents to section 11(c) through State courts. To the extent some State Plans enforce their anti-retaliation provisions through administrative processes, the relevant administrative merits determinations will be identified in the second guidance to be issued by the Department identifying the State laws that are equivalent to the Federal Labor Laws.

[53] Sections six and seven refer to the FLSA's minimum wage and overtime provisions, 29 U.S.C. 206, 207.

process before an ALCA recommendation. *See* Guidance, section III(B).

In sum, the Department considers the addition of settlements themselves as a type of administrative merits determination to be unwarranted.

2. Defining "Civil Judgment"

The Proposed Guidance defined "civil judgment" as

> any judgment or order entered by any Federal or State court in which the court determined that the contractor or subcontractor violated any provision of the Labor Laws, or enjoined or restrained the contractor or subcontractor from violating any provision of the Labor Laws.

80 FR 30574, 30580. The Proposed Guidance discussed the types of court judgments or orders that meet the definition of "civil judgment" and explained that a "private settlement where the lawsuit is dismissed by the court without any judgment being entered is not a civil judgment." *Id.* The Proposed Guidance provided that "civil judgment" includes a judgment or order that is not final or is subject to appeal. *Id.*

A number of industry commenters who objected to the inclusion of nonfinal agency determinations in the definition of administrative merits determination had similar concerns about the definition of civil judgment. They objected to defining civil judgments to include court judgments that are either nonfinal or still subject to appeal, and they were concerned that they could lose a contract as a result of a judgment that is later reversed. For these commenters, a civil judgment should include only final orders or judgments where all appeals have been exhausted or not pursued. In addition, several industry commenters objected to including preliminary injunctions.

The Department has carefully considered all of these comments and declines to limit the definition of civil judgment. The Proposed Guidance defined civil judgment to include some nonfinal and subject-to-appeal court judgments for the same reasons that it defined administrative merits determinations to include nonfinal agency determinations. In addition to those reasons, which the Department incorporates here as well, the Department notes that it would make little sense to exclude Federal court judgments that follow a full discovery process under the Federal rules simply because these judgments still may be subject to appeal or have been appealed to a Federal court of appeals.

The Department also reiterates that the Guidance's definition of civil judgment does not include all court decisions that are nonfinal. The Guidance's definition is limited to those judgments or orders in which the court "determined" that there was a Labor Law violation or "enjoined or restrained" a violation. This means that, for example, a court order denying an employer's motion to dismiss a complaint about an alleged Labor Law violation or an order denying an employer's motion for summary judgment would not be "civil judgments." In both of those examples, the court has found only that it is possible that the complainant may be able to succeed later at trial; it has not made a determination that a Labor Law has been violated.

As several commenters noted, a type of nonfinal court order that the Department explicitly included as a civil judgment in the Proposed Guidance is a preliminary injunction that "enjoins or restrains a violation of the Labor Laws." 80 FR 30574, 30580. Preliminary injunctions issued in Federal court are not considered to be "final" orders. However, enforcement agencies may pursue injunctive relief when faced with the most egregious violations of the Labor Laws (for example, imminent danger actions under the OSH Act or 10(j) injunctions under the NLRA), and courts grant preliminary injunctions only in extraordinary circumstances and after a strong showing of a likelihood of success. Accordingly, the Department concludes that the granting of such relief may be relevant to the assessment of a contractor's respect for legal obligations and workplace conditions. It is therefore appropriate to require disclosure.

Finally, the Department reiterates that the definition of "civil judgment" simply determines the scope of contractors' disclosure obligations—the first stage in the Order's process. Not all disclosed violations are relevant to contractors' integrity and business ethics. Only those that are later determined to be serious, repeated, willful, and/or pervasive will be considered as part of the weighing step and will factor into the ALCA's written analysis and advice. Moreover, contractors have an opportunity to submit any additional information—including mitigating information—that they believe may be helpful in assessing their overall record of compliance. In sum, court judgments and orders that meet the definition of "civil judgment" must be disclosed—even where nonfinal or still subject to appeal.

While the Department is not changing the definition of civil judgment, two clarifications are necessary. One commenter, the Equal Employment Advisory Council (EEAC), expressed concern that the definition of civil judgment would include temporary restraining orders (TROs). The Proposed Guidance did not intend to include TROs under the definition of civil judgment. TROs are distinct from preliminary injunctions under the Federal Rules of Civil Procedure and can, in certain circumstances, be issued without notice to the adverse party. *Compare* Fed. R. Civ. Proc. 65(a) (preliminary injunctions) *with* Fed. R. Civ. Proc. 65(b) (TROs). To avoid any confusion, the Guidance has been revised to clarify that TROs are not civil judgments for the purposes of the Order, and need not be disclosed.

Another commenter, National Security Technologies, LLC, requested that the Department limit the definition of civil judgements to exclude judgments entered pursuant to accepted Offers of Judgment under Federal Rules of Civil Procedure 68, which are "in the nature of settlements." The Department agrees that accepted offers of judgment under Rule 68 are akin to settlements and are not "civil judgments" for the purposes of the Order. The Guidance has been revised accordingly.

3. Defining "Arbitral Award or Decision"

The Proposed Guidance defined "arbitral award or decision" as

> any award or order by an arbitrator or arbitral panel in which the arbitrator or arbitral panel determined that the contractor or subcontractor violated any provision of the Labor Laws, or enjoined or restrained the contractor or subcontractor from violating any provision of the Labor Laws.

80 FR 30580. The Proposed Guidance stated that arbitral awards and decisions must be disclosed "even if the arbitral proceedings were private or confidential." *Id.* It further provided that "arbitral award or decision" includes an award or order that is not final or is subject to being confirmed, modified, or vacated by a court. *Id.*

Several industry commenters objected to disclosing arbitral awards or decisions that are confidential or private. The AARP, on the other hand, supported the disclosing of private or confidential arbitration awards and decisions. Industry commenters contended that disclosing awards may have a chilling effect on arbitration, that disclosure may require the breaking of arbitration or labor contracts, and that the confidentiality of arbitration is provided by some State laws. One commenter, the Aerospace Industries Association, suggested excluding arbitral awards from confidential or private arbitrations conducted under arbitration agreements executed before the effective date of any final rule implementing the Order.

The Department declines to narrow its interpretation of the disclosure requirement to exclude confidential or private arbitrations. The Order specifically requires the disclosure of arbitral awards or decisions without exception, *see* Order, section 2(a)(i), and confidentiality provisions generally have exceptions for disclosures required by law. Moreover, there is nothing particularly sensitive about the four pieces of basic information that contractors must publicly disclose about each arbitral award or decision—the Labor Law that was violated, the case number, the date of the award or decision, and the name of arbitrator. *See* FAR 22.2004–2(b)(1)(i). Parties routinely disclose more information about an arbitral award when they file a court action seeking to have the award vacated, confirmed, or modified.

In addition to the commenters discussed above who object generally to disclosing any nonfinal determinations or judgments, some industry commenters specifically objected to disclosing nonfinal arbitration awards or decisions. The Department declines to modify the Guidance in response to these comments. The disclosure of arbitral awards that are nonfinal or still subject to court review is appropriate for all of the same reasons discussed above supporting the Department's inclusion of administrative merits determinations and civil judgments that are nonfinal or subject to appeal. Furthermore, the Department notes that the Federal Arbitration Act provides a very high standard that must be met for a court to vacate or modify an arbitral award. *See* 9 U.S.C. 10 (standard for vacating award); 9 U.S.C. 11 (standard for modifying award).

The AARP supported the proposed definition of arbitral award or decision, but proposed broadening the definition to include awards and decisions where the employee has succeeded "on any significant issue or receives even some of the benefits sought." Under this proposal, an award or decision would have to be disclosed, "even if there was no formal determination of a legal violation." The Department declines to modify the Guidance in response to this comment. The Order requires disclosure of arbitral awards or decisions rendered against the contractor "for violations of any of the [Labor Laws]." Order, section 2(a)(i). The Department believes that this requires a finding that a Labor Law was violated in order to trigger the Order's disclosure requirement.

Two industry commenters requested clarification about arbitral decisions that involve both a collective bargaining agreement (CBA) and one of the Labor Laws. One asserted that the Guidance's disclosure requirements should expressly exclude arbitral decisions finding CBA violations that do not amount to statutory violations. The other commenter, the Association of General Contractors of America (AGC), stated that arbitral decisions involving CBAs are often unclear about whether their rulings are "on a matter of law, contract, or both." The Department agrees that an arbitrator's decision finding only a CBA violation does not trigger the disclosure requirement. However, where the arbitrator does make an express finding that there was a violation of one of the Labor Laws, then the decision or award must be disclosed, regardless of whether the same conduct also violated the CBA.

4. Successive Labor Law Decisions Arising From the Same Underlying Violation

The Proposed Guidance addressed and gave examples regarding how contractors should disclose successive administrative merits determinations, civil judgments, and/or arbitral awards or decisions that arise from the same underlying violation. *See* 80 FR 30580–81. One commenter, Jackson Lewis LLC, stated that this discussion would have been "unnecessary" had the Department not required disclosure of "alleged violations." According to this comment, "[n]othing in the already dense DOL Guidance is more complex than sorting what successive determinations must be reported and what need not be reported." After considering this comment, the Department modifies this section of the Guidance for improved readability—but does not make any substantive changes. The Department believes that the examples provided, including a new example, will help contractors meet their disclosure obligations under the Order.

C. Information That Must Be Disclosed (Formerly "What Information Must Be Disclosed")

The Order itself contains guidance for what information a contractor must disclose. *See* Order, section 2(a). And the FAR rule includes specific disclosure requirements and processes. *See* FAR 22.2004–1(a). This section of the Proposed Guidance directly tracked the language of the proposed FAR rule. Where the FAR Council has modified relevant language in its final rule, the Department has modified the final Guidance accordingly. In addition, in one nonsubstantive change to this section of the Guidance, the Department has created a separate subsection to highlight the process for contracting officers to give contractors the opportunity to submit any additional relevant information (including mitigating factors) about Labor Law violations. Several commenters submitted concerns or suggestions about this section; however, because comments took issue with the content of the FAR rule, the FAR Council has addressed those comments, and the comments are not summarized or discussed here.

Specific Disclosure Requirements

The Proposed Guidance included the requirements from the proposed FAR rule about the specific information that a contractor must disclose, at the time of the responsibility determination, about each Labor Law decision. It provided that, for each decision, the contractor disclose: (1) The Labor Law that was violated; (2) the case number, inspection number, charge number, docket number, or other unique identification number; (3) the date of the determination, judgment, award, or decision; and (4) the name of the court, arbitrator(s), agency, board, or commission that rendered it. *See* 80 FR 30574, 30581.

Several labor unions and employee advocacy organizations suggested requiring disclosure of more information than the four types of information listed above. The Department retains the Guidance as proposed. The specific disclosure requirements are promulgated in the final FAR rule, FAR 22.2004–2(b)(1)(i), and they are included in the Guidance only for completeness. Moreover, the Department notes that contracting officers have an existing duty under the FAR to obtain such additional information as may be necessary to be satisfied that a contractor has a satisfactory record of integrity and business ethics, *see* FAR 9.105–1(a), and the FAR rule requires contracting officers to request Labor Law decision documents from contractors where the ALCA is otherwise unable to obtain them, *see* FAR 22.2004–2(b)(2)(iii). While the Department has not amended the list of specific disclosure requirements, it has added to the final Guidance a list of the relevant unique identification numbers for each category of violation.

Accuracy of Contractor Disclosures

One group of worker-advocacy organizations expressed concern that the Guidance does not instruct contracting officials to verify the accuracy of the information that a contractor submits. The comment noted that a new Labor Law violation might be found against a contractor after the contractor's initial representation about its record. In such a case, the comment suggested, a contractor that responds negatively at the initial representation stage should be required at the subsequent preaward stage to provide an update about any new violations (assuming that a responsibility determination is undertaken at that point).

Several unions and worker-advocacy groups applauded the proposed FAR rule and the Proposed Guidance for significantly improving reporting requirements and public disclosures; however, they also expressed concerns that the penalties for contractors who misrepresent or omit information when disclosing Labor Law violations should be strengthened. Several of these commenters argued that disclosures regarding Labor Law violations should be provided under oath and/or under penalty of perjury. Another commenter, the AARP, suggested that the FAR Council should clearly state that "failure to report violations will lead to a determination of nonresponsibility."

The Department does not believe that contractor representations regarding Labor Law matters should be treated differently than other representations related to responsibility. Under the FAR, a contractor who fails to furnish a certification related to responsibility matters or to furnish such information as may be requested by the contracting officer related to that contractor's responsibility shall be given an opportunity to remedy the deficiency. *See* FAR 9.104–5. Ultimately, failure to furnish the certification or such information "may render the offeror nonresponsible." *Id.* In addition, well-established penalties already exist for bad faith and material misrepresentations regarding responsibility matters.[54]

The Department does recognize that a substantial period of time may pass between the contractor's initial representation and the date of the award. In particular, as the commenter referenced above suggested, a contractor may initially represent that it has no Labor Law decisions to disclose, but a Labor Law decision may be rendered against it after that initial representation prior to the date of an award. Contractors have a duty to provide an update to the contracting officer prior to the date of an award if the contractor's initial representation is no longer accurate. Thus, the final FAR rule now provides that if a new Labor Law decision is rendered or the contractor otherwise learns that its representation is no longer accurate, the contractor must notify the contracting officer of an update to its representation. *See* FAR 52.222–57(e). This means that if the contractor made an initial representation that it had no Labor Law decision to disclose, and since the time of the offer the contractor has a Labor Law decision to disclose, the contractor must notify the contracting officer. The reverse is also true: If, for example, an offeror made an initial representation that it has a Labor Law decision to disclose, and since the time of the offer that Labor Law decision has been vacated by the enforcement agency or a court, the contractor must notify the contracting officer.

Postaward Disclosure Updates

The disclosure section of the Proposed Guidance included a description of the Order's requirement that contractors update their disclosures postaward, during performance of a covered procurement contract. *See* 80 FR 30574, 30581. The Department has reorganized the final Guidance to consolidate discussion of postaward disclosure and assessment issues in a new section (Section IV). Comments about the postaward disclosure are addressed in a parallel section of this preamble section-by-section analysis, below.

Subcontractor Disclosures

The disclosure section of the Proposed Guidance also included an explanation of the Order's subcontractor disclosure provisions. *See* 80 FR 30574, 30582. The Department has reorganized the final Guidance to consolidate discussion of subcontractor issues in a new section (Section V). Comments about the subcontractor disclosure provisions are addressed in a parallel section of this preamble section-by-section analysis, below.

III. Preaward Assessment and Advice (Formerly "Weighing Violations of the Labor Laws")

Section III of the Guidance explains the process by which ALCAs classify, weigh, and provide advice about a contractor's violations of the Labor Laws during the preaward period. Based on the comments received, the Department believes that the separate steps in this process may not have been emphasized clearly enough in the Proposed Guidance. Several commenters, for example, appeared to conflate the determination that a contractor had committed a serious, repeated, willful, and/or pervasive violation with a finding of nonresponsibility.

In response to these comments, the final Guidance clarifies that the ALCA's preaward assessment of a contractor's Labor Law violations and the contracting officer's responsibility determination are separate process points, performed by two separate individuals: The ALCA assesses the nature of the violations and provides analysis and advice; the contracting officer, informed by the ALCA's analysis and advice, makes the responsibility determination—the determination of whether the contractor is a responsible source to whom a contract may be awarded. Contracting officers consider assessments provided by ALCAs consistently with advice provided by other subject matter experts during the responsibility determination.

The final Guidance also clarifies that the ALCA's role involves a three-step process. First, an ALCA reviews all of the contractor's violations to determine if any are serious, repeated, willful, and/or pervasive. Second, the ALCA then weighs any serious, repeated, willful, and/or pervasive violations in light of the totality of the circumstances, including the severity of the violation(s), the size of the contractor, and any mitigating factors that are present. Third, after this holistic review, the ALCA provides written analysis and advice to the contracting officer regarding the contractor's record of Labor Law compliance, and whether a labor compliance agreement or other action is warranted.

As noted above, the final Guidance clarifies that it is the contracting officer who makes the final determination of whether a contractor is, or is not, a responsible source.

The assessment of violations postaward, during the performance of the contract, is now addressed separately in section IV of the Guidance.

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[54] A contractor may be disqualified, the award canceled, or the contract terminated if the misrepresentation is made in bad faith or has materially influenced the agency's responsibility determination. *See Impresa Construzioni Geom. Domenico Garufi* v. *United States,* 238 F.3d 1324, 1339–40 (Fed. Cir. 2001). Where the award is canceled, the contractor can be precluded from bidding on a reprocurement contract. *See Northrop Grumman Corp.* v. *United States,* 50 Fed. Cl. 443, 468 (2001). Moreover, under appropriate circumstances, a contractor may also be suspended or debarred, or held liable under the False Claims Act, among other available remedies. *See* 31 U.S.C. 3730; 18 U.S.C. 1001.

Similarly, the assessment of subcontractor violations is addressed separately in section V of the Guidance.

The Department has modified Appendix E to reflect changes in the final Guidance's description of the PreAward Assessment and Advice process.

A. Classifying Labor Law Violations (Step One)

The first step in this process is the classification of Labor Law violations as serious, repeated, willful, and/or pervasive. The Order specifically directs the Department to develop guidance to assist agencies in making these classification determinations. Order, section 4(b)(i). The Order specifies that the Department's Guidance should "incorporate existing statutory standards for assessing whether a violation is serious, repeated, or willful" where they are available. *Id.* In addition, the Order provides the Department with parameters for developing standards where none are provided by statute. *Id.*

Subjectivity of Classification Criteria

A number of industry commenters argued that the Proposed Guidance's definitions of serious, repeated, willful, and pervasive violations are too subjective and do not provide enough direction for contractors to determine whether their violations could put them at risk of losing Federal contracts. Some commenters expressed concern that whether a violation is serious, repeated, or willful may depend in some cases on an exercise of discretion by the official or investigator at the enforcement agency that issued the underlying administrative merits determination. In contrast, many worker-advocacy organizations and labor unions expressed support for the flexibility of these classification criteria and the Department's overall approach to weighing violations and assessing mitigating factors.

While the Department acknowledges that some of the criteria for classifying Labor Law violations require closer analysis, the Department notes that many of the definitions set out objective criteria that leave little, if any, room for ambiguity. For example, whether a violation involves at least $10,000 in back wages or $5,000 in fines or penalties (one of the criteria for classifying serious violations), or whether a violation occurs within 3 years of a prior violation (one of the criteria for classifying repeated violations) are straightforward matters. Furthermore, the Department expects that ALCAs will develop substantial expertise in administering the Order and will be well-positioned to classify and weigh each violation. In some cases, as set forth below, the Department has modified criteria that were not sufficiently clear.

Moreover, the Department disagrees that the contracting officer's responsibility determination will be arbitrary if it includes consideration of the ALCA's assessment of Labor Law enforcement actions that themselves involve the exercise of prosecutorial discretion, such as an enforcement agency's decision as to how much of a fine or penalty to assess, or whether to find one violation or multiple violations. The Department believes that the legitimate exercise of such discretion is inherent in prosecuting Labor Law violations—just as it is for prosecuting violations of fraud, tax, and other laws that are already expressly considered in the responsibility determination under the FAR—and does not undermine the contracting officer's consideration of Labor Law enforcement actions under the Order.

Furthermore, ALCAs are advisors to the contracting officer on one aspect of responsibility: Integrity and business ethics with regard to labor law compliance. Contracting officers consider the information provided by advisors such as ALCAs, as well as advice from other experts in fields such as audit, law, engineering, information security, and transportation.

Relationship of Classification Criteria to Disclosure Requirements

A few commenters representing employers also expressed concern that they would be uncertain as to which violations must be disclosed due to perceived ambiguities in the definitions of serious, repeated, willful, and pervasive violations. Such comments misapprehended the role that these definitions play in the implementation of the Order. All Labor Law decisions must be disclosed, whether or not they involve violations that are serious, repeated, willful, or pervasive. As described above, the definitions of these four terms are used by ALCAs during the classification process to screen out minor infractions that have been disclosed, not by contractors to determine whether the decisions must be disclosed in the first place. The Department clarifies this point in the final Guidance.

Standard for Determining Application of Classification Criteria

One industry commenter questioned what quantum of evidence will be necessary to support a determination that a Labor Law violation meets one of the criteria for establishing that a violation is serious, repeated, willful, or pervasive. In this regard, the commenter focused on language in the Proposed Guidance stating that a violation would meet one of the classification criteria if the Labor Law decision "support[s] a conclusion" that the criterion in question had been met, and the commenter expressed concern that this standard suggested that contractors could be found to have committed a serious, repeated, willful, or pervasive violation based on only scant evidence in the record supporting such a classification.

The Department has clarified in the Guidance that to serve as the basis for a determination that a violation is serious, repeated, willful, and/or pervasive, the relevant criteria must be readily ascertainable from the Labor Law decision itself. This means that ALCAs should not second-guess or re-litigate enforcement actions or the decisions of reviewing officials, courts, and arbitrators. It also means that a contractor will not be deemed to have committed a serious, repeated, willful, or pervasive violation based on a minimal or arguable showing. While ALCAs and contracting officers may seek additional information from the enforcement agencies to provide context, they should rely on only the information contained in the Labor Law decisions themselves to determine whether violations are serious, repeated, willful, or pervasive.

Subcontractor Violation Classification

Some of the comments by employer groups voiced additional concern about the way the Proposed Guidance described the process for a prime contractor to classify and weigh its subcontractors' Labor Law violations. These commenters asserted that many prime contractors, especially small businesses, will not have access to labor law experts or legal counsel familiar with the intricacies of the fourteen Labor Laws, and that these prime contractors would not be well-equipped to evaluate whether violations are serious, repeated, willful, or pervasive.

The Guidance now contains a separate section addressing subcontractor responsibility (Section V). The Department addresses comments related to subcontractor responsibility in a parallel section of the preamble section-by-section analysis, below.

Scope of Classification Criteria

Many commenters representing employer groups argued that the criteria for serious, repeated, willful, and pervasive violations were too broad and would encompass too many violations, which would increase the burden of the Order by subjecting more contractors to scrutiny. These commenters expressed concern that a prospective contractor would be found nonresponsible based on, for example, a pair of violations that were inadvertent but nonetheless met the criteria for repeated violations; or one or two OSH Act violations that, while meeting the statutory criteria for serious violations, caused no harm and were addressed swiftly. Some feared that even a single serious violation would necessarily lead to a nonresponsibility determination.

The Department believes that this fear is misplaced. Below, in parts 1 through 4 of this subsection, the Department responds to commenters' specific concerns regarding the criteria used to classify violations as serious, repeated, willful, or pervasive. In some cases, as explained below, the definitions have been narrowed in response to concerns of over-inclusiveness.

The Department believes the final Guidance appropriately defines its criteria, given their use in the classification and weighing process. It is important to note that the classification of a contractor's violation as serious, repeated, willful, or pervasive does not mean that the contractor loses an award. Rather, as noted in the Guidance, one of the purposes of classifying violations as serious, repeated, willful, and pervasive is to screen out many violations that may be inadvertent or less likely to have a significant impact. These classifications limit consideration of a contractor's violations to those that may merit closer examination. After the initial screening, ALCAs will conduct a review of these more significant violations, taking into account the totality of the circumstances, including any mitigating factors. In this weighing phase, the serious, repeated, willful, and pervasive classifications provide a useful framework for analysis and help ensure government-wide consistency. In the final Guidance, the Department clarifies the description of this process and has reiterated that classifying a violation as serious, repeated, willful, or pervasive does not automatically result in a finding that a contractor lacks integrity and business ethics.

In sum, the Department believes the criteria set forth in the final Guidance for determining whether violations are serious, repeated, willful, or pervasive are fair, appropriate, and administrable.

Classification of Violations Involving Retaliation

Some commenters representing employee interests expressed concern that the definitions of serious, repeated, and willful violations did not sufficiently account for violations involving retaliation. In general, it is the intent of the Guidance that violations of the Labor Laws that involve retaliation must be reported and assessed under the Order. The Department has made a number of modifications to the Guidance—discussed further below in the separate sections on serious, repeated, and willful violations—to ensure that this is the case. As stated in both the proposed and final Guidance, all violations involving retaliation are considered serious violations under the Order.

Effect of Reversal or Vacatur of Basis for Classification

Some commenters expressed concern that under the Proposed Guidance, a violation could be classified as serious, repeated, willful, and/or pervasive based on a determination by an agency, arbitrator, or court that was later reversed, vacated, or otherwise rescinded. For example, some of these commenters expressed concern that a contractor could be found to have committed a serious violation based on an OSHA citation that was originally classified as "serious" and later changed to "other than serious" or withdrawn entirely.

In response to these comments, the final Guidance clarifies that if a Labor Law decision or portion thereof that would otherwise cause a violation to be classified as serious, repeated, willful, and/or pervasive is reversed or vacated, the violation will not be classified as such under the Order. Just as a Labor Law decision that is reversed or vacated in its entirety need not be disclosed, so too, if a Labor Law decision is modified such that the underlying basis for the violation's classification as serious, repeated, willful, or pervasive has been reversed or vacated, the classification no longer applies.

The sections below discuss comments received regarding the criteria for classifying violations as serious, repeated, willful, or pervasive and the changes that the Department has made to the Guidance in response to these comments. In addition to the changes discussed below, where necessary, the Department has also made conforming changes to the examples in the four appendices listing examples of the four categories of violations.

1. Serious Violations

The Proposed Guidance set forth several classification criteria for determining whether a violation is serious under the Order. As an initial matter, some commenters indicated that the Proposed Guidance was unclear as to whether a violation needs to meet only one of the listed criteria in order to be considered serious. The Department believes that the Proposed Guidance was clear on this point in that it stated that a Labor Law violation that meets "at least one" of the listed classification criteria for seriousness will be considered a serious violation. To provide additional clarity, the final Guidance states that a violation involving "any one" of the listed criteria will be classified as serious. The Guidance also further clarifies that separate criteria apply to OSH Act violations enforced through citations, as discussed in the section below.

a. OSH Act and OSHA-Approved State Plan Violations Enforced Through Citations and Equivalent State Documents (Formerly "OSH Act")

In the Proposed Guidance, the Department stated that a violation is serious under the Order if OSHA or an OSHA-approved State Plan issued a citation that it designated as serious, issued a notice of failure to abate, or issued an imminent danger notice. The Proposed Guidance also listed several criteria under which violations of any of the Labor Laws can be classified as serious. The Department received several comments regarding the classification of violations under the OSH Act and OSHA-approved State Plans.

Classification of Non-Citation OSHA Violations

Several commenters requested clarification about the classification of OSH Act and OSHA-approved State Plan violations that are not enforced through citations—such as retaliation, false-statement violations, notices of failure to abate, and imminent danger notices ("non-citation OSHA violations"). These commenters noted that such violations are enforced not through citations but through notices or through complaints filed in court. Thus, for these violations, OSHA and State Plan agencies never make a designation of "serious," as they do with OSH Act and State Plan violations enforced by citation ("citation OSHA violations"). These commenters suggested that the Guidance should be clarified to ensure that non-citation OSHA violations may still be classified as serious under the Order.

The Department agrees that non-citation OSHA violations may still be classified as serious under the Order. The final Guidance therefore clarifies the treatment of OSH Act violations by dividing serious violations into two categories. The first consists of citation OSHA violations, while the second consists of all other violations of the Labor Laws. This second category includes all non-citation OSHA violations, as well as violations of the other Labor Laws. The final Guidance states that a citation OSHA violation is serious if—and only if—the violation involves a citation or equivalent State document that was designated as serious or an equivalent State designation.[55] Non-citation OSHA violations are classified as "serious" according to the same criteria that are used to classify violations of the other Labor Laws. For example, if a court issues a civil judgment finding that a contractor violated the OSH Act's anti-retaliation provisions by firing a worker in retaliation for filing a complaint with OSHA, an ALCA should find that this violation is serious because it meets the retaliation criterion for serious violation under the Order, as discussed below in section III(A)(1)(b)(vi) of this section-by-section analysis.[56]

Classification of Citation OSHA Violations

With respect to OSH Act and State Plan violations enforced through citations, the Department received several comments. Employee advocates generally supported the Department's proposal to use OSHA or OSHA-approved State Plan designations of "serious" as the basis for classifying violations as "serious" under the Order. In contrast, industry commenters expressed concern with this approach. The industry commenters pointed out that a substantial majority of OSHA violations were designated as serious.[57] They argued that while the term "serious" may be appropriate in the context of OSH Act enforcement, the use of the OSH Act's "serious" designation for the Order is inconsistent with the Proposed Guidance's goal of identifying those violations that are "most concerning and bear on an assessment of a contractor's or subcontractor's integrity and business ethics." Some of the industry commenters noted that serious violations under the OSH Act may in some cases include what they characterized as "technical violations" of certain standards.

While the Department recognizes these commenters' concerns, the final Guidance retains this aspect of the definition of serious violations. The Order requires that the Department's Guidance "shall . . . where available, incorporate existing statutory standards for assessing whether a violation is serious, repeated, or willful." Order, section 4(b)(i)(A). The OSH Act is alone among the Labor Laws identified in the Order in that it contains an explicit statutory standard for assessing whether a violation is serious. *See* 29 U.S.C. 666(k) (stating that a violation is serious "if there is a substantial probability that [the hazard created by the violation could result in] death or serious physical harm . . . unless the employer did not, and could not with the exercise of reasonable diligence, know" of the existence of the violation). This standard reflects a congressional determination that OSH Act violations that meet the above definition are serious and should be evaluated and enforced accordingly. Moreover, this standard underscores the severe consequences that can result from such violations, regardless of their relative prevalence.

Accordingly, the Guidance's definition explicitly incorporates the OSH Act's definition of a serious violation, as contemplated by the Order. The Guidance retains the approach under which ALCAs will classify as "serious" under the Order any citation that the relevant enforcement agency designated as serious. As noted above, the classification of a violation as serious under the Order does not mean that the contractor will not receive an award. Rather, the purpose of classifying certain violations as serious is to limit the scope of violations that will be considered by an ALCA to those that merit closer examination. Moreover, in the second step of the assessment process, ALCAs will review all mitigating factors provided by the contractor, including whether a violation has been remediated.

b. All Other Violations of the Labor Laws

The Proposed Guidance listed several other criteria that, if met, would result in the classification of a violation as serious. As noted above, under the final Guidance, these criteria apply to all violations except OSH Act and OSHA-approved State Plan violations that are enforced through citations and equivalent State documents. Comments on each of these classification criteria are addressed in turn below.

i. Violation Affects at Least 10 Workers Making up at Least 25 Percent of the Contractor's Workforce at the Worksite or Overall (Formerly "25% of the Workforce Affected")

The Proposed Guidance stated that a Labor Law violation is serious if the affected workers made up 25 percent or more of the workforce at the worksite. Consistent with the Order's direction, the Department believes that violations impacting a significant number of employees are serious. The Department specifically sought comments on this classification criterion.

Some unions and employee-advocacy organizations argued that this threshold may exclude violations that affect significant numbers of people—such as a violation that affects all of the workers in a particular job category—but do not reach the 25 percent threshold. Some groups advocated for a lower threshold such as 5 percent, while others argued that additional thresholds should be added, such as deeming a violation serious if it affects at least a certain number of employees (*e.g.*, at least 50 employees). Some of these groups also argued that a violation should be serious if it affects at least 25 percent of a contractor's overall workforce—in addition to the worksite-specific threshold.

In contrast, some employer groups argued that the 25 percent threshold is too low and will be over-inclusive. Some asserted that certain types of violations, such as an employer's failure to post required employee-rights notices or establishment of general workplace policies that are found to violate the law but whose consequences may not be readily apparent, should not qualify as serious. Some of these commenters proposed eliminating the 25 percent criterion, raising the threshold, tailoring it to each Labor Law, or permitting it to be waived under appropriate circumstances. Some recommended that this threshold, if it remains in the Guidance, apply only to employers with at least a specified minimum number of employees to avoid situations in which the threshold is triggered by a very small number of affected workers.

Additionally, some commenters requested that the Department clarify how the 25 percent threshold would apply to violations spanning multiple worksites. Two of these commenters criticized the Department's definition of the term "worksite," suggesting that it was ambiguous when compared with the regulatory definition under the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. 2101–2109. *See* 20 CFR 639.3. Two commenters requested the Department clarify how the 25 percent threshold would apply to construction contractors. One proposed that the Guidance state that "a violation is serious if it affects 25 [percent] of the workforce of the particular contractor or subcontractor, working at a specific construction site." Another noted that in the construction industry the number of workers at a worksite often varies, so it would be difficult to determine the total number of workers for this analysis.

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[55] Thus, OSH Act and State Plan citations that were designated by the relevant enforcement agency as other-than-serious cannot be classified as serious under the Order, even if they satisfy one of the criteria applicable to other violations of the Labor Laws (such as violations that affect 25 percent of the workforce).

[56] As a result of this clarification, notices of failure to abate a violation and imminent danger notices, which are non-citation OSHA violations, are now discussed below in subsection (v) of section III(A)(1)(b), "All other violations of the Labor Laws."

[57] In 2015, approximately 74 percent of OSHA violations were designated as serious. This data is available on OSHA's Web site at *https://www.osha.gov/dep/2015_enforcement_summary.html.*

After careful consideration of all these comments, the Department retains the 25 percent threshold for this criterion in the final Guidance, though with some modifications. The Order explicitly directs the Department to take into account "the number of employees affected" in determining whether a violation is serious. Order, section 4(b)(i)(B)(1). Accordingly, the Department considers a violation affecting numerous employees to be serious, even if it may not result in significant back wages or penalties or place workers in danger of immediate harm. This includes precisely the types of violations identified by industry commenters. Failing to post a legally required notice, for example, is serious because it deprives employees of knowledge of their rights under the Labor Laws, which could result in violations not being detected. The Department believes that the threshold is appropriate.

In response to the commenters' concerns, however, the Department has modified the 25 percent threshold so it applies only when the violation affects at least 10 workers. This change avoids triggering the 25 percent threshold when only a few workers are affected. The Department declines to set a higher minimum number of workers because it believes that violations affecting a significant percentage of a workforce are serious even if the overall size of a workforce is small. For example, if a small business that employs only 40 employees commits a violation that affects 15 of those employees, such a violation should be considered serious even though the overall number of affected employees is relatively low.

The Department has also added an example to the Guidance to help clarify how this criterion applies to worksites with multiple employers. The Proposed Guidance stated that for purposes of calculating the 25 percent threshold, the number of workers at the worksite

> does not include workers of another entity, unless the underlying violation of the Labor Laws includes a finding that the contractor or subcontractor is a joint employer of the workers that the other entity employs at the worksite.

80 FR 30583. The final Guidance now explains that if a contractor employs 40 workers at a worksite, then a violation is serious if it affects at least 10 of the contractor's workers at the site, even if other companies also employ an additional 40 workers at the same site.

The Department declines to replace the 25 percent threshold entirely with a threshold based on an absolute minimum number of workers. Such a threshold would disproportionately affect larger employers. The Department also declines to adopt a criterion based on a violation's effect on all employees in a particular job classification. Such a criterion would not be easily administrable because it would frequently require ALCAs to perform the difficult task of distinguishing between job classifications.

The Department also declines to lower the threshold of affected workers from 25 percent. While any threshold will necessarily include some violations and exclude others, the Department believes that 25 percent is an appropriate benchmark for determining whether a violation affects a sufficient number of workers to be considered serious—therefore warranting further review. While recognizing the concerns of employee advocates that certain violations may fall short of the threshold, the Department notes that these violations may meet other criteria for seriousness. The Department also recognizes the concerns of employer groups that the 25 percent threshold is overinclusive, but the Department believes that these concerns will be addressed by the overall assessment of a contractor's violations, and particularly the assessment of mitigating factors.

The Department declines to make other changes to the definition of "worksite." The Department notes that the definition in the Guidance is already similar to the definition of "single site of employment" under WARN Act regulations. Both definitions provide that: (1) A worksite can be a single building or a group of buildings in one campus or office park, but that separate buildings that are not in close proximity are generally separate worksites; and (2) for workers who do not have a fixed worksite, their worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. *See* 20 CFR 639.3(i). These similarities support the Department's conclusion that the definition of "worksite" in the Guidance is appropriate.

With regard to construction workers specifically, the Department anticipates that construction workers who regularly work at multiple sites will in most cases fall into the latter category described above; namely, their worksite will be the site to which they are assigned as their home base, from which their work is assigned, or to which they report. The FMLA's implementing regulations, which adopt a similar definition of worksite, provide helpful examples for determining the number of workers at construction worksites. *See* 29 CFR 825.111(a)(2).

The Department agrees with the commenters who suggested that a violation should be serious if it affects at least 25 percent of a contractor's overall workforce (provided that it affects at least 10 workers). The final Guidance has been modified accordingly. In practice, in the vast majority of cases (if not all cases) in which a violation affects at least 25 percent of a contractor's overall workforce, it will also affect at least 25 percent of the contractor's workforce at a particular worksite; however, this criterion has been added to ensure coverage of violations that are not specific to a particular worksite.

ii. Fines, Penalties, and Back Wages (Formerly "Fines, Penalties, Back Wages, and Injunctive Relief")

The Proposed Guidance stated that a violation would be serious if fines and penalties of at least $5,000 were assessed, back wages of at least $10,000 were due, or injunctive relief was imposed by an enforcement agency or a court.

Threshold Amounts

Numerous commenters addressed the proposed $5,000 and $10,000 thresholds. These commenters were divided as to whether the thresholds were too high or too low. Industry commenters advocated raising these amounts. In particular, they argued that the $10,000 back-wage threshold is overbroad and would encompass too many violations. A few of these commenters addressed the fine-and-penalty thresholds and urged the Department to base them on the amount collected rather than assessed. One commenter suggested that the back wage threshold should be tied to the size of the contractor. Another organization argued that such a standard is overbroad as it applies to violations of anti-discrimination Labor Laws. This commenter asserted that the monetary thresholds under this criterion would disproportionately classify discrimination violations as serious when compared, for instance, to wage-and-hour violations. Another commenter similarly asserted that most actions under Title VII, the ADA, the ADEA, and the NLRA seeking backpay would trigger a finding of a serious violation using a $10,000 threshold.

In contrast, many employee-advocacy and union commenters asserted that the $10,000 back-wage threshold is too high and would not capture violations affecting low-wage workers. Several requested clarification regarding whether the back-wage threshold could be satisfied by adding together the back wages due to multiple employees in the same matter. Three of these commenters proposed, as an alternative or additional metric, that a violation be characterized as serious when the amount of back wages due is equal to ten percent or more of wages paid the worker annually. Some commenters also suggested that the Department define a violation as serious any time that fees are awarded or penalties are assessed for wage-and-hour violations.

After carefully reviewing all of these comments, the Department retains the $5,000 and $10,000 thresholds in the final Guidance. The Order explicitly instructs the Department to take into account "the amount of damages incurred or fines or penalties assessed with regard to the violation." Order, section 4(b)(i)(B)(1).

While violations of some Labor Laws may satisfy the monetary thresholds more often than others, the Department concludes that creating statute-specific thresholds would not further the goals of the Order. First, even if discrimination violations are more likely than wage-and-hour law violations to result in back-wage awards of greater than $10,000, in both cases an employer has wrongfully denied employee(s) $10,000 in wages.[58] In terms of the economic impact on the workforce, $10,000 in lost wages due to discrimination is just as serious as $10,000 in lost wages due to a wage-and-hour violation. A sum of $10,000 is over 18 percent of the median household income in the United States, and over 31 percent of the median nonfamily household income.[59]

Second, as described above, classifying violations as serious, repeated, willful, and pervasive aims to screen out Labor Law violations that are less significant for purposes of the Order and to focus on those violations that are more likely to implicate a contractor's integrity and business ethics. After this initial screening, an ALCA then weighs these violations in light of the totality of the circumstances and any mitigating factors that are present. Thus, while a single civil judgment awarding $15,000 in back wages to an employee in a Title VII lawsuit will be classified as serious under the Order, an ALCA generally should not make a negative assessment of the contractor's record of Labor Law compliance based on this violation standing alone.

It is also noteworthy that, as discussed below, many violations of the Labor Laws will not implicate these thresholds at all because back wages and penalties have not, or cannot, be assessed. For example, reasonable cause determinations by the EEOC cannot implicate these thresholds because they do not specify an amount of back wages. Similarly, as discussed below, the $5,000 threshold for fines and penalties (as opposed to back wages) will only be implicated in administrative enforcement matters where fines and penalties are assessed, and not private litigation or arbitration where they are not.

The Department also declines to lower the amounts of the monetary thresholds under this criterion because it believes the amounts are appropriate. Some unions and employee advocates appeared to construe the Proposed Guidance as suggesting that the $10,000 back-wage threshold applied only on a per-employee basis. The Department clarifies in the final Guidance that the thresholds are cumulative; *i.e.,* they can be satisfied by summing the fines and penalties assessed for all workers affected by the violation or by summing the back wages due to all affected employees.

Similarly, the Department rejects the proposal to classify as serious all wage-and-hour violations involving fees or penalties. The Order instructs the Department to take into account "the amount" of fines or penalties assessed in defining serious violations. Order, section 4(b)(i)(B(1). Thus, the Order contemplates that the Department will establish a threshold for fines or penalties assessed for the purposes of determining whether a violation is serious.

The Department also does not adopt the proposal to use an alternative criterion for serious violations based on the ratio of back wages due compared with the affected workers' annual pay. While this could be an informative metric, this information will generally not be readily ascertainable from Labor Law decisions. To facilitate efficient and consistent enforcement of the Order, the Department seeks to ensure that ALCAs rely only on information that can be easily obtained by reviewing Labor Law decisions.

However, in response to these and other comments, the Department has modified the guidance on monetary thresholds in several respects. First, the Proposed Guidance stated that the threshold amounts are measured by the amount the enforcement agency "assessed." Many employer groups argued that this threshold should instead take into consideration any later reduction in the assessed amount—either where the enforcement agency unilaterally reduces this amount or where it is reduced during settlement negotiations. These commenters asserted that enforcement agencies may initially assess a very high amount or the statutory maximum as a negotiating tactic with little regard for the seriousness of the violation. One commenter further argued that the meaning of "assessed" is ambiguous given that some enforcement agencies, such as the NLRB, typically do not quantify or otherwise assess monetary amounts in a complaint.

The Department agrees with industry commenters on this point and has modified the Guidance accordingly. The final Guidance states that the thresholds are measured by the amount "due." This means that if an enforcement agency consents to accept a reduced amount of either back wages or penalties for a violation, it is that lesser amount that will be used to determine seriousness. As stated in the Proposed Guidance, a reduced settlement amount may be based on factors other than the seriousness of a violation. In other circumstances, however, the reduction may reflect the enforcement agency's judgment that a lower assessment more appropriately reflects the seriousness of a particular violation. The Department believes that reliance on the final agreed-upon amount will avoid confusion because this amount will likely be the one memorialized in the parties' records. Similarly, if the amount initially assessed by an enforcement agency is later reduced by an adjudicative body—for example, if the Department files a civil complaint in an FLSA case seeking $15,000 in back wages but a court awards only $8,000—it is the reduced amount that is relevant for evaluating seriousness.

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[58] The Department has removed one paragraph from the Guidance relating to statistics on the WHD administrative merits determinations that would meet the $10,000 and $5,000 thresholds. This modification is intended to eliminate extraneous information from the final Guidance and does not indicate any substantive change in its application.

[59] *See* U.S. Census Bureau, "Income, Poverty and Health Insurance Coverage in the U.S.: 2015," *http://www.census.gov/newsroom/press-releases/2015/cb15-157.html* (Sept. 16, 2015).

Reliance on a lesser amount will not apply if an employer files for bankruptcy and cannot pay the full amount, or simply refuses to pay such that the full penalty is never collected. In such cases, the original assessed amount is the amount due, and therefore should be used when evaluating seriousness.

The Department has also modified the definition of "fines and penalties" that will implicate the $5,000 threshold. Specifically, this definition now includes only monetary penalties imposed by an administrative agency and does not include liquidated damages under the ADEA or punitive damages under other statutes. This change has been made both in response to concerns about the scope of the $5,000 threshold and to simplify administration of the Order. As noted in Guidance, however, liquidated damages under the FLSA are included in the calculation of back wages because they are compensatory in nature.

For clarity, the Department has also added a paragraph to the Guidance explaining that if an enforcement agency issues an administrative merits determination that does not include an amount of back wages due or fines or penalties assessed—for example, if the Department files a complaint seeking back wages but does not specify the amount—then the violation cannot be classified as serious using this criterion until the amount has been determined.

Finally, one commenter recommended clarifying the Guidance to address any mitigation of damages from an employee's interim employment. The commenter argued that employees' earnings from obtaining interim employment should not be factored into the amount of total back wages for the purpose of the $10,000 threshold. The Department declines to modify the Guidance on this point. ALCAs will use the amount of back wages due set forth in the Labor Law decision, whether or not that amount reflects an adjustment for mitigation. To facilitate efficient and consistent enforcement of the Order, the Department seeks to ensure that ALCAs rely only on information that is readily ascertainable from Labor Law decisions.

Injunctive Relief

The Proposed Guidance stated that a violation would be classified as serious if injunctive relief "was imposed by an enforcement agency, a court, or an arbitrator or arbitral panel." 80 FR at 30584.

In response to the proposal, some industry groups commented that the imposition of injunctive relief alone should not justify classifying a violation as serious. In their view, injunctive relief is often imposed regardless of the nature or severity of the violation, and as a result, they expressed concern that this criterion would capture minor or technical violations. For example, these commenters noted that the NLRB always or almost always imposes injunctive relief, including requiring the employer to post a notice that it has been found in violation of the NLRA. These commenters suggested that this criterion should be eliminated or modified to include additional criteria justifying the conclusion that the violation was serious. In contrast, commenters representing workers agreed with the Proposed Guidance that the imposition of injunctive relief warrants characterizing the violation as serious, given that such relief is rarely imposed by courts.

After the consideration of the above comments, the Department has removed injunctive relief from the list of criteria used to classify violations as serious in the final Guidance. The Department agrees that including all injunctions entered by courts, arbitrators, and enforcement agencies as serious may include violations that do not necessarily bear on a contractor's integrity and business ethics.

However, the Department believes that the imposition of injunctive relief by courts could be relevant to the ALCA's ultimate assessment of a contractor's record of Labor Law compliance. Courts issue injunctions only in rare circumstances.[60] A preliminary injunction—an injunction entered before a final judgment—is an "extraordinary remedy." *Winter* v. *Natural Res. Def. Council,* 555 U.S. 7, 22, 24 (2008). Specifically,

> [a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Id. at 20. Thus, in cases involving the enforcement of the Labor Laws, preliminary injunctions will be issued only when a court has concluded that the employer has likely violated one of the Labor Laws and that such conduct threatens to irreparably harm workers and the public interest. A permanent injunction—one issued at the end of litigation—requires essentially the same showing, except that the plaintiff must show actual success on the merits rather than a likelihood of success. *See Amoco Prod. Co.* v. *Vill. of Gambell, AK,* 480 U.S. 531, 546 n.12 (1987).

Because both preliminary and permanent injunctions imposed by courts are rare and require a showing of compelling circumstances, including irreparable harm to workers and a threat to the public interest, the Department believes that if a contractor has already been found to have committed serious, repeated, willful, and/or pervasive violations, ALCAs should examine whether any of those violations resulted in the imposition of injunctive relief by a court. The Department has therefore moved the discussion of injunctive relief into the "weighing" section of the Guidance: "Factors that weigh against a satisfactory record of Labor Law compliance." *See* Guidance, section III(B)(2). Thus, the imposition of injunctive relief alone will not result in a violation being classified as serious. However, if a violation has already been classified as serious, repeated, willful, and/or pervasive, the imposition of injunctive relief for such a violation will weigh against a finding that the contractor is responsible.

iii. Any Violations That Cause or Contribute to Death or Serious Injury (Formerly "MSPA or Child Labor Violations That Cause or Contribute to Death or Serious Injury")

Under the Proposed Guidance, any violation of MSPA or the FLSA child labor provisions that causes or contributes to the death or serious injury of one or more workers is a serious violation.

Several employee advocacy organizations suggested that a violation of any Labor Law, not just MSPA or the FLSA, should be serious when the violation causes or contributes to the death or serious injury of a worker. Many also requested that physical assault—whether or not it results in death or a serious injury—be considered a serious violation. They argued that any physical assault was inherently severe and so should be deemed serious. Similarly, some commenters suggested that any violation involving sexual harassment should be deemed a serious violation.

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[60] For example, as an article cited by one commenter noted, studies have found that courts issue injunctions in less than 3 percent of Federal employment discrimination cases. *See* Mark D. Gough, "The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation," 35 Berkeley J. Emp. & Lab. L. 91, 105 n.62 (2015).

The Department adopts the first of these proposals but not the latter two. The Proposed Guidance limited this criterion to MSPA and the FLSA child-labor provisions because, other than the OSH Act and State Plans, violations of MSPA's health-and-safety provisions and the FLSA's child-labor provisions are most likely to have the potential to result in death or serious injury.[61] However, in the less likely event that a violation of one of the remaining Labor Laws causes or contributes to death or serious injury, the Department agrees that the violation would be serious. The Department therefore adopts this change in the final Guidance. As a related matter, the final Guidance also modifies the definition of "serious injury" for purposes of this criterion; rather than incorporating by reference the meaning of "serious injury" from the FLSA's child labor provisions, the Guidance explicitly defines "serious injury" as an injury that requires the care of a medical professional beyond first-aid treatment or results in more than five days of missed work.

The Department does not adopt the suggestions regarding physical assault or sexual harassment. While the Department agrees that many violations involving physical assault or sexual harassment are serious, the Department declines to broaden this criterion because these terms can also include more minor workplace altercations or interactions.

iv. Employment of Minors Who Are Too Young To Be Legally Employed or in Violation of a Hazardous Occupations Order

The Department did not receive comments directly addressing this criterion. The Department retains the Guidance as proposed.

v. Notices of Failure To Abate and Imminent Danger Notices

The Proposed Guidance stated that a violation is serious under the Order if it involves a notice of failure to abate an OSH Act violation or an imminent danger notice under the OSH Act or an OSHA-approved State Plan. The Department did not receive comments specifically addressing these criteria, with the exception of the comments described above requesting that the Department clarify that non-citation OSHA violations such as these are serious under the Order despite not having being designated as "serious" by the relevant enforcement agency.

As noted above, the Department has clarified this matter in the final Guidance by dividing OSH Act and OSHA-approved State Plan violations into two categories: Citation OSHA violations, which are serious if, and only if, they were designated as such by the relevant enforcement agency; and Non-Citation OSHA Violations, which are serious if they meet other criteria listed in the Guidance. Because notices of failure to abate and imminent danger notices fall into the second category, the final Guidance lists them separately from citation OSHA violations. The final Guidance also clarifies that notices of failure to abate State Plan violations (as well as any State equivalents of notices of failure to abate or imminent danger notices) are serious violations because failing to correct a hazard after receiving formal notification of the need to do so represents a serious disregard for the law.

vi. Retaliation (Formerly "Adverse Employment Actions or Unlawful Harassment for Exercising Rights Under Labor Laws")

The Proposed Guidance classified violations involving "adverse employment actions or unlawful harassment for exercising rights under Labor Laws," *i.e.*, retaliation, as serious. The Department defined "adverse employment actions" to include discharge, refusal to hire, suspension, demotion, or threats.

A number of commenters expressed general support for the inclusion of retaliation within the definition of a serious violation. Some supportive commenters were concerned, however, that the Department had limited "adverse employment action" to only the five types of adverse action explicitly listed in the Proposed Guidance. These commenters urged the Department to adopt instead the Supreme Court's definition of adverse employment action in *Burlington Northern & Santa Fe Railway Company* v. *White*, 548 U.S. 53 (2006). Under *Burlington Northern*, to prove retaliation under Title VII, a plaintiff "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (internal citations and quotation marks omitted). While this definition does not include "petty slights, minor annoyances, and simple lack of good manners," it does include constructive discharges; transfers to undesirable shifts, locations, or positions; or changes in other terms and conditions of employment, *see id.*, none of which were specifically listed in the Proposed Guidance.

The Department finds the comments regarding *Burlington Northern* persuasive. In particular, it agrees with the AARP comment that "[r]etaliation that could deter a reasonable worker from exercising a protected right [under the Labor Laws] is per se serious." The Department concludes that *Burlington Northern* provides a useful standard for what constitutes an adverse action sufficient to support a finding of retaliation, and modifies the Guidance to adopt it. The Department further notes that the list of examples of adverse actions in the Guidance is not meant to be exclusive.

In contrast to the generally supportive comments about this criterion from employee-advocacy groups, several employer groups opposed the classification of violations involving retaliation as serious. These industry commenters argued that many allegations of discrimination include accusations of retaliation as a matter of course, and that many large employers will have one or more such allegations pending at any given time.

The Department retains retaliation as a classification criterion for serious violations. As noted in the Proposed Guidance, retaliation is serious because it dissuades workers from reporting violations and therefore may mask other serious conduct by employers. In response to concerns that retaliation allegations may be included in discrimination complaints as a matter of course, the Department reiterates that a private complaint is not disclosable as a Labor Law decision under the Order unless and until it leads to an administrative merits determination, a civil judgment, and or an arbitral award or decision. A complaint alone must be disclosed only if it has been filed by an enforcement agency following an investigation, and therefore constitutes an administrative merits determination. In sum, the Department believes that retaliation is serious, and the final Guidance retains this criterion.

While retaining the criterion, the Department modifies it for clarity. Two industry commenters suggested that the language in the Proposed Guidance could have allowed a finding that an "adverse employment action" alone is a serious violation under the Order—regardless of whether it was taken in retaliation for protected activity. That was not the Department's intent. Rather, an adverse employment action only becomes relevant to this criterion when it is taken in retaliation for a worker exercising a right protected by any of the Labor Laws. To clarify the Guidance, the Department has changed the title of this criterion to "retaliation" and has adjusted the wording of the description accordingly.[62]

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[61] The Proposed Guidance did not reference the OSH Act or OHSA-approved State Plans here because any violation of the OSH Act or OSHA-approved State Plans involving a risk of death or serious injury will be enforced with a citation designated as serious and thus will already be a serious violation under the Order. This criterion is intended to capture violations of other Labor Laws that result in death or serious injury.

One commenter expressed concern about the NLRA example of a serious violation in Appendix A, which describes a contractor that fired the employee who was the lead union adherent during the union's organizing campaign. The commenter noted that such behavior would only be unlawful if the discharge was in retaliation for the employee's protected activity. The Department agrees with the commenter and modifies the example in the Appendix A of the final Guidance to clarify this point.

vii. Pattern or Practice of Discrimination or Systemic Discrimination

The Proposed Guidance stated that violations involving a "pattern or practice of discrimination or systemic discrimination" are serious. Specifically, the Proposed Guidance defined a pattern or practice of discrimination as involving "intentional discrimination against a protected group of employees, rather than discrimination that occurs in an isolated fashion." 80 FR 30585. Systemic discrimination involves "a pattern or practice, policy, or class case where the discrimination has a broad impact on an industry, profession, company or geographic area." *Id.* Systemic discrimination also includes "policies and practices that are seemingly neutral but may cause a disparate impact on protected groups." *Id.*

Several employee-advocacy commenters argued that the Guidance should explicitly state that systemic discrimination is not limited to class actions or government agency enforcement, so that individual or multi-plaintiff lawsuits challenging a widely-applicable practice or rule should fall within the definition of serious. Because the definition in the Proposed Guidance singled out "class cases," these commenters believed that one could infer that the Guidance excludes individual or multi-plaintiff non-class action cases in which the Labor Law decision includes a finding that systemic discrimination occurred. The Department agrees that systemic discrimination is not limited to litigation brought in a class action, and has clarified this point in the final Guidance.

Several of these commenters also advocated that this criterion for serious violations should not be limited to "systemic discrimination," but instead should include all "systemic labor law" violations. Commenters cited the misclassification of employees as independent contractors and the failure to provide adequate safety equipment to an entire workforce as systemic violations involving company-wide policies that should be deemed serious.

The Department declines to expand the definition of systemic discrimination. The term "systemic discrimination" has a well-established meaning under anti-discrimination laws, and the Department intended to restrict this criterion to such violations. Moreover, the Department expects that many widespread violations unrelated to discrimination will likely be classified as serious under other criteria in the Guidance.

Finally, one industry commenter criticized the systemic discrimination criterion, asserting that it was too broad because virtually all of OFCCP's discrimination allegations are "pattern or practice" or systemic allegations. The Department disagrees. While OFCCP does focus on this category of discrimination, only a small fraction of OFCCP's show-cause notices include a finding that systemic discrimination has occurred. Additionally, as noted earlier, OFCCP issues fewer than 200 show-cause notices per year; thus, the overall number of OFCCP cases implicated by this criterion is not large. In the Department's view, systemic or pattern-or-practice discrimination remains an appropriate criterion for determining whether a violation is serious.

While the Department has not made any substantive changes to the definitions for this criterion, the Department has added a list of the Labor Laws to which this criterion will generally apply, as well as a reference to a leading Supreme Court case defining "pattern or practice," *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 336 (1977).

viii. Interference With Investigations

The Proposed Guidance stated that a Labor Law violation is serious if the Labor Law decision's findings support a conclusion that the contractor interfered with an enforcement agency's investigation. The Proposed Guidance also listed several examples of interference.

Several industry commenters voiced concern about this category. Specifically, these commenters argued that this category could penalize contractors for raising good-faith challenges to the scope of an agency's investigation. For example, commenters stated that a contractor may refuse to provide documents to an agency because it takes the position that the agency's request is overbroad. Some of these commenters argued that the contractor has a right to challenge the scope of a subpoena, document request, or request for information, and that the assertion of such rights should not be construed as interference—regardless of whether a court ultimately decides in favor of the contractor. One commenter suggested that such disputes should be distinguished from more serious obstruction such as threatening workers who speak to enforcement agency investigators, falsifying or destroying records, or making misrepresentations to investigators.

After careful consideration of the comments received, the Department is retaining this criterion for serious violations in the final Guidance but is limiting its scope. The Department views interference with investigations as serious because such behavior severely hinders enforcement agencies' ability to conduct investigations and correct violations of law. The Department also recognizes, however, that employers may have good-faith disputes with agencies about the scope or propriety of a request for documents or access to the worksite.

Accordingly, the Department has narrowed the "interference" criterion such that interference is defined to include only the following circumstances:

(1) A civil judgment was issued holding the contractor in contempt for failing to provide information or physical access to an enforcement agency in the course of an investigation; or

(2) It is readily ascertainable from the Labor Law decision that the contractor—

(a) Falsified, knowingly made a false statement in, or destroyed records to frustrate an investigation under the Labor Laws;

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[62] Similarly, the Business Roundtable commented on one of the Proposed Guidance's examples of retaliatory behavior that referenced an employee who is disciplined for making a complaint about potential violations of Labor Laws. The Business Roundtable expressed concern that any employee complaint could be deemed a serious violation. However, the Proposed Guidance did not suggest that the employee's complaint itself could be considered a serious violation; rather, the relevant serious violation would be where an administrative merits determination, civil judgment, or arbitral award or decision finds that the employer retaliated against the employee for making the complaint.

(b) Knowingly made false representations to an investigator; or

(c) Took or threatened to take adverse actions against workers (for example, termination, reduction in salary or benefits, or referral to immigration or criminal authorities) for cooperating with or speaking to government investigators or for otherwise complying with an agency's investigation (for example, threatening workers if they do not return back wages received as the result of an investigation).

This revision aims to capture two primary categories, both of which the Department considers serious: First, instances in which a court not only concludes that the employer unlawfully withheld documents or access from an agency, but holds the employer in contempt for doing so; and second, instances in which an employer takes affirmative steps to frustrate an investigation.

ix. Material Breaches and Violations of Settlements, Labor Compliance Agreements, or Orders (Formerly "Material Breaches and Violations of Settlements, Agreements, or Orders")

The Proposed Guidance stated that a violation is serious if it involves a breach of the material terms of any agreement or settlement, or a violation of a court or administrative order or arbitral award. One commenter expressed concern regarding this criterion, stating that the Guidance did not clearly explain how to determine that a settlement agreement had been materially breached.

The Department retains this criterion for serious violations in the Guidance, with a clarification. The concept of material breach is well-established in law. *See, e.g., Frank Felix Associates, Ltd.* v. *Austin Drugs, Inc.*, 111 F.3d 284, 289 (2d Cir. 1997) (stating that a material breach, under New York law, is one that "go[es] to the root of the agreement between the parties"). The Department believes that in most cases, the existence of a material breach will be clear. For example, if an employer agrees in a settlement to classify certain types of workers as employees, but continues to classify them as independent contractors, this will constitute a material breach. The intent of this provision is not to capture technical or questionable breaches; rather, it is to capture those cases in which an employer agrees, as part of a settlement, to take certain steps to remedy Labor Law violations but then fails to do so. The Department also clarifies the relevant "agreements" whose material breach will constitute a serious violation. The term "agreements" includes settlements and labor compliance agreements.

c. Table of Examples

The Department has updated the table of examples to reflect the changes in the final Guidance.

d. Other Comments on Serious Violations

The National Women's Law Center suggested that the Guidance should include a separate subcategory of serious violations that captures "the scope and severity of harm caused by a violation," such as violations that implicate more than one right under the Labor Laws, severe monetary losses, or other types of severe losses.

The Department agrees that the Guidance should capture the scope and severity of harm caused by a violation, but does not believe it is necessary to create an additional criterion or separate subcategory of serious violations. The existing criteria for serious violations generally seek to capture the scope and severity of harm, by focusing on, for example, the degree of monetary harm, the number of affected workers, and the extent to which a violation risked or caused death or serious injury. In addition, scope and severity of harm are taken into consideration during the process by which ALCAs weigh a contractor's overall record of Labor Law compliance. As discussed below, in analyzing a contractor's record during the weighing process, an ALCA does not need to give equal weight to two violations that receive the same classification. Some violations may have more significant consequences on a contractor's workforce than others, and therefore will be given more weight during the determination of whether a contractor has a satisfactory record of Labor Law compliance. *See* Guidance, section III (B).

Several industry commenters expressed concern that a contractor could be found to have committed a serious violation based on a novel legal theory asserted by an agency or upheld for the first time by a court. These commenters cited, for example, recent NLRB complaints challenging employee handbooks and corporate social media policies and EEOC reasonable cause determinations challenging employer background check policies.

The Department declines to adopt a per se rule under which violations based on a novel legal theory would not be deemed serious. Many cases call for the application of established legal rules to new circumstances, and the fact that no identical violation has been previously prosecuted is not relevant to the measure of the violation's effect on the contractor's workers. If a contractor believes that a violation should carry less weight because it was based on a novel legal theory, the contractor should make such arguments when submitting mitigating information about the violation. The Guidance provides that a recent legal or regulatory change may be a factor weighing in favor of a satisfactory record of Labor Law compliance. This may be the case where "prior agency or court decisions suggested that a practice was lawful, but the Labor Law decision finds otherwise." Guidance, section III (B)(1)(e).

One labor union commenter urged that an NLRA "hallmark violation" should be treated as a serious violation, and that more than one hallmark violation should be considered pervasive. Hallmark violations include certain violations that are particularly coercive, including "threats of plant closure or loss of employment, discharge or other serious adverse action against union adherents, and grants of significant benefits to employees." *Regency Manor Nursing Home*, 275 NLRB 1261, 1262 (N.L.R.B. 1985).

The Department declines to modify the definitions of serious and pervasive violations to include a new criterion of NLRA hallmark violations. Unlike, for example, OSHA, which clearly designates citations as "serious" on the face of the citation, the General Counsel of the NLRB does not characterize violations as "hallmark" in a complaint. Thus, the ALCA would have to make a determination regarding whether a violation is a hallmark one, and the Department does not envision ALCAs having such a role. Nevertheless, the Department notes that many hallmark violations would likely be considered serious under one of the existing criteria, such as the criteria on retaliation and violations that affect at least 10 workers comprising 25 percent of a contractor's workforce.

Similarly, another labor union commenter suggested that the Guidance add a criterion addressing corporate policies that significantly chill employees' rights to speak out, organize, or file complaints. The commenter specifically suggested that multiple policies aimed at silencing workers should be considered serious. The Department declines to adopt this suggestion. When a contractor is found to have maintained such an unlawful, corporate policy governing employee conduct, such a policy will likely affect at least 25 percent of the employer's workforce and will be classified as serious on that basis. As noted above, the criterion setting out the 25 percent threshold is meant to capture violations to the extent that they affect a sufficient number of employees. Accordingly, the Department believes that an additional category of serious violations that captures only certain types of corporate policies is unnecessary.

2. Repeated Violations

The Order provides that the standard for repeated violations should "incorporate existing statutory standards" to the extent such standards exist. Order, section 4(b)(i)(A). The Order further provides that, where no statutory standards exist, the standards for repeated should take into account "whether the entity has had one or more additional violations of the same or a substantially similar requirement in the past 3 years." *Id.* section 4(b)(i)(B)(2). None of the Labor Laws contains an explicit statutory definition of the term "repeated." Accordingly, the Proposed Guidance defined "repeated" violations using the "substantially similar" language suggested by the Order. *See* 80 FR 30587.

The final Guidance generally maintains the Proposed Guidance's definition of "repeated" violations, with some modifications. First, where the Proposed Guidance included a general definition followed by a list of examples, the final Guidance instead sets forth a statute-specific, exhaustive list of repeated violations. This list closely parallels the examples that were presented in the Proposed Guidance, with the exception of some changes explained below.

The Department has made several nonsubstantive changes to the definition for clarity. The Guidance now uniformly refers to the initial violations that form the basis for a repeated violation as "prior" violations, instead of "predicate" violations. Where discussing the relationship between the prior violation and the repeated violation itself, the Guidance refers to the latter as the "subsequent violation." The Guidance also now refers to the relevant 3-year period for determining if a violation is repeated as the "3-year look-back period." The Department also has changed the order of and retitled some of the subsections within the definition, and has created a separate sub-heading for "citation OSHA violations." Finally, the Department has made a few additional changes to the definition in response to comments, as discussed below.

a. OSH Act and OSHA-Approved State Plan Violations Enforced Through Citations or Equivalent State Documents

The Proposed Guidance stated that "[f]or violations of the OSH Act, violations are repeated if they involve the same or a substantially similar hazard." 80 FR 30574, 30588.

Employee-advocacy commenters as well as an industry commenter submitted comments on this criterion. These commenters stated that this definition seemed to classify some violations as repeated for the purposes of the Order that would not be considered "repeat" under the OSH Act. The reason is that the enforcement scheme of the OSH Act includes both OSHA and the OSHA-approved State Plans. Under that scheme, violations of State Plans are not considered by Federal OSHA when classifying a Federal violation as "repeat." Similarly, State Plan agencies typically do not cite an employer for a repeat violation if the prior violation occurred outside the State's jurisdiction.

The employee advocates supported application of the "substantially similar" standard as proposed in the Guidance, regardless of the variance from the OSH Act. The industry commenter argued that ALCAs and contracting officers would not have the expertise to determine that two violations were substantially similar if the relevant enforcement agency did not originally designate them as such.

After carefully considering all of the comments received, the Department has decided to modify the Guidance criterion for repeated violations under the OSH Act and OSHA-approved State Plans. It was not the Department's intention to expand the scope of repeated violations beyond those already deemed "repeat" under the OSH Act and OSHA State Plans. Rather, the Department's reference in the Proposed Guidance to violations that involve the same or a substantially similar hazard was solely intended to incorporate the Federal OSH Act's standard for repeated violations. *See Potlatch Corp.*, 7 O.S.H. Cas. (BNA) 1061, 1063 (O.S.H.R.C. 1979). Therefore, the Guidance now states that an OSH Act or OSHA-approved State Plan violation that was enforced through a citation or equivalent State document (a "citation OSHA violation") will only be "repeated" under the Order if OSHA or the relevant State Plan agency originally designated the citation as repeated, repeat, or any similar State designation.

While modifying the OSHA definition in this way, the Department retains the 3-year timeframe limitation discussed in the Proposed Guidance. In making "repeated" designations, OSHA's current policy is to consider whether the employer has violated a substantially similar requirement any time within the previous 5 years. The Order, however, indicates that a 3-year look-back period is appropriate. Accordingly, when a contractor discloses a decision involving an OSH Act "repeated" violation, the ALCA will need to review the decision to determine whether the prior violation occurred in the previous 3 years. This means that the prior violation must have become a final order of the OSHRC or equivalent State agency within the previous 3 years. In sum, only those citations that have been designated as repeated and where the prior violation occurred in the 3 years preceding the second citation should be classified as repeated under the Order.

The final Guidance also deletes a statement from the Proposed Guidance that violations of MSPA and the OSH Act may be substantially similar if they involve substantially similar hazards. Upon further consideration, the Department believes that such an approach is not easily administrable.

For non-citation OSHA violations, neither OSHA nor State Plan agencies make "repeated" designations. Accordingly, the Guidance clarifies that ALCAs will classify non-citation violations as repeated using the same general criteria that apply to all other violations. *See* Guidance, section III(A)(2)(b).

b. All Other Violations

Under the final Guidance, for all Labor Law violations other than citation OSHA violations, a violation is "repeated" if it is

> the same as or substantially similar to a prior violation of the Labor Laws that was the subject of a separate investigation or proceeding arising from a separate set of facts, and became uncontested or adjudicated within the previous 3 years.

Guidance, section III(A)(2). Comments related to this definition are discussed below.

i. Prior Violation Must Have Been Uncontested or Adjudicated (Formerly "Type of Violations")

The Proposed Guidance stated that the prior violation that forms the basis for a repeated violation must be a civil judgment, arbitral award or decision, or adjudicated or uncontested administrative merits determination. Under the Proposed Guidance, this restriction did not apply to the subsequent violation. In other words, the violation classified as repeated did not itself need to be adjudicated.

Several employer groups challenged this distinction. Most of these commenters argued that the definition should require both the prior and subsequent violations to have been adjudicated for the subsequent one to be classified as repeated. One commenter asserted that limiting the prior violation to adjudicated or uncontested administrative merits determinations implicitly recognizes that unadjudicated determinations are inherently suspect. Many of these comments echoed those made by employer groups regarding the required disclosure of nonfinal administrative merits determinations, in which these groups suggested that only final agency decisions should have to be disclosed under the Order.

In the final Guidance, the Department generally retains the proposed framework, though with some modifications discussed below. The purpose of classifying a violation as repeated is to identify those employers who fail to modify their conduct after having committed a previous substantially similar violation. Employers who have repeatedly violated the law are more likely than other contractors to commit future similar Labor Law violations during performance of a Federal contract. Because an ALCA will give a repeated violation additional scrutiny, it is appropriate to create more limited parameters for the prior violation by requiring it to have been uncontested or adjudicated. As the Guidance notes, this framework is intended to ensure that violations will only be classified as repeated when the contractor has had the opportunity—even if not exercised—to present facts or arguments in its defense before an administrative adjudicative authority concerning the prior violation.

Moreover, the Department chose to require the prior violation to be uncontested or adjudicated because this formulation is similar to the one used to designate repeated violations under the OSH Act. In enforcing the OSH Act, OSHA requires a prior substantially similar violation to have become a final order of the OSHRC before the occurrence of the subsequent violation. The subsequent violation itself, however, need not be a final order of the OSHRC. The Department has chosen to model the definition of "repeated" under the Order after the OSH Act practice.

While the Department declines to change basic underlying framework, the final Guidance contains a few minor changes in response to the comments received and for clarity.

First, for clarity, the final Guidance explains that any Labor Law decision—not just administrative merits determinations—must be uncontested or adjudicated to be a prior violation. Since civil judgments and arbitral awards or decisions are inherently adjudicated proceedings, this change is nonsubstantive; but it is made to emphasize that the same basic standard applies to all Labor Law decisions.

Second, in response to concerns of employer commenters, the final Guidance narrows the definitions of "uncontested" and "adjudicated," as follows:

An "uncontested" violation is now defined as a violation that is reflected in:

(1) A Labor Law decision that the employer has not contested or challenged within the time limit provided in the Labor Law decision or otherwise required by law; or

(2) A Labor Law decision following which the employer agrees to at least some of the relief sought by the agency in its enforcement action.

These changes are made to ensure that a violation will not be considered uncontested unless it is resolved or any applicable time period to contest it has expired. Under the Proposed Guidance's definition, an administrative merits determination would have been considered uncontested unless a timely appeal of the determination was filed or pending. This definition, however, did not account for cases in which a contractor may intend to dispute an agency's determination, but the burden is on the agency to initiate litigation in order to continue enforcement, such as in the case of EEOC reasonable cause determinations or FLSA enforcement proceedings brought by WHD. Under the revised definition, such violations will not be considered uncontested.

An "adjudicated" violation is now defined as a violation that is reflected in:

(1) A civil judgment,

(2) an arbitral award or decision, or

(3) an administrative merits determination that constitutes a final agency order by an administrative adjudicative authority following a proceeding in which the contractor had an opportunity to present evidence or arguments on its behalf.

The Guidance explains that "administrative adjudicative authority," as used in (3) above, means an administrative body empowered to hear adversary proceedings, such as the ARB, the OSHRC, or the NLRB. ALJs are also administrative adjudicative authorities; however, their decisions will only constitute adjudicated violations if they are adopted as final agency orders. The Guidance notes that this typically will occur, for example, if the party subject to an adverse decision by an ALJ does not file a timely appeal to the agency's administrative appellate body, such as those referenced above. Thus, if an administrative merits determination is subject to multiple levels of appellate review, such as proceedings before the Department that go before an ALJ and then the ARB, only a decision following the final level of appellate review constitutes an adjudicated administrative merits determination.

Finally, the Department also modifies the Guidance to clarify that the prior violation must be uncontested or adjudicated before the date of the Labor Law decision for the subsequent violation in order for the subsequent violation to be classified as repeated. The Guidance includes an example illustrating this point.

ii. 3-Year Look-Back Period (Formerly "Timeframe")

The Proposed Guidance stated that the prior violation for a repeated violation must have occurred within the 3-year "reporting period."

As an initial matter, the Department has recognized that this characterization did not accurately describe the 3-year timeframe for considering whether a violation is repeated. The 3-year "reporting period" (which the Guidance now refers to as the "3-year disclosure period") is relevant to the Order's basic requirement of which Labor Law decisions a contractor must disclose at all—not to the determination of whether a violation was repeated. This disclosure time period extends back from the date of the contractor's offer. The Department, however, interprets section 4(b)(i)(B)(2) of the Order, which directs the Department to consider "whether the entity has had one or more additional violations of the same or a substantially similar requirement in the past 3 years," to refer to a distinct look-back period for identifying repeated violations—wherein the prior violation must have occurred no earlier than 3 years prior to the date of the subsequent violation (not the date of the offer). The Department has included language clarifying this distinction in the Guidance.[63]

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[63] Along the same lines, the Department notes that although, as noted above, there will be a phase-in of the 3-year disclosure period, there is no such phase-in for the 3-year look-back period for classification of repeated violations. Thus, an ALCA may find that violation was repeated based on the

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Some employee-advocacy groups argued that a 3-year look-back period is too short. Two of these groups argued that the look-back period should be expanded beyond 3 years, stating that because agency investigations and related litigation often take months or even years, it will be difficult to identify patterns of repeated violations within only a 3-year window. These commenters suggested that in the preaward phase, the contractor should be asked if it committed any similar violations during the previous 5 years, and in the postaward phase, the look-back period should be expanded to include all years in which the contractor held contracts.

The Department declines to modify the Guidance in response to these suggestions. The 3-year look-back period is explicitly set forth in the Order and reflects the intention of the President that only violations during this time period will be considered in determining whether violations are repeated. *See* Order, section 4(b)(i)(B)(2). A 5-year period would be inconsistent with the Order.

In contrast, one industry commenter suggested that the 3-year look-back period is too long, and would result in the consideration of a contractor's conduct that may have occurred long before the beginning of the look-back period. Even if the prior violation itself occurred within the 3-year look-back period, argued the commenter, the underlying conduct that led to that prior determination could have taken place much earlier, especially if the prior violation has a long litigation history.

As noted earlier in the discussion of disclosure requirements, the Department recognizes that there will be Labor Law decisions that must be disclosed under the Order where the underlying conduct occurred outside the 3-year disclosure period. This is unavoidable in a system under which violations need not be disclosed until there is an administrative merits determination, civil judgment, or arbitral award or decision. The same is true for the separate 3-year look-back period for repeated violations.

However, the Department understands the commenter's concern that, under the Proposed Guidance, a violation that is the subject of lengthy litigation could create a later repeated violation that the Order clearly did not intend to classify as such. For example, OFCCP could issue a show cause notice to a contractor on January 1, 2017. The contractor could contest the violation, resulting in an ALJ determination on January 1, 2018, an ARB determination on January 1, 2019, a civil judgment by a district court on January 1, 2020, and a civil judgment by a court of appeals on January 1, 2021. If the contractor commits a substantially similar violation on December 31, 2023, it would be less than 3 years after the court of appeals decision. But it would be 6 years after the initial OFCCP show cause notice was rendered—far outside the 3-year look-back period. The Department agrees that it would be contrary to the spirit of the Order to use the 2021 date to determine whether the conduct in 2023 is "repeated."

To address this issue, the Department has modified the Guidance in the following manner: The final Guidance explains that for a violation to be classified as repeated, the prior violation must have become uncontested or adjudicated (in other words, first become adjudicated) no more than 3 years prior to the date of the repeated violation (that is, the violation that is classified as repeated).

The final Guidance explains that the violation becomes uncontested either on the date on which any time period to contest the violation has expired, or on the date of the employer's agreement to at least some of the relief sought by the agency in its enforcement action (*e.g.*, the date a settlement agreement is signed). A prior violation becomes adjudicated on the date on which the violation first becomes an adjudicated violation. This means that the violation becomes adjudicated on the date when the violation first becomes a civil judgment, arbitral award or decision, or a final agency order by an administrative adjudicative authority following a proceeding in which the contractor had an opportunity to present evidence or arguments on its behalf.

Thus, for a violation that is the subject of successive adjudications such as in the above example, the dates of subsequent decisions after the first adjudication are not relevant. Accordingly, in the above example—which is reproduced in the final Guidance—the relevant date of the prior violation is January 1, 2019, the date of the ARB order, because this is the date on which the violation becomes a final agency order by the ARB, and therefore first becomes an adjudicated violation. It could serve as a prior violation only for a substantially similar violation decision that is issued after January 1, 2019 and prior to January 1, 2022.[64] The dates of the subsequent Federal court decisions are not relevant.

iii. Separate Investigations or Proceedings

The Proposed Guidance also stated that "[t]he prior violation(s) must be the subject of one or more separate investigations or proceedings." 80 FR 30587. One industry commenter expressed concern that this requirement could be applied inconsistently in cases where multiple agencies (*e.g.*, OSHA and WHD) investigate an employer. The commenter suggested that if both agencies conduct a joint investigation, then no violations would be repeated, but if the agencies conduct separate investigations, some of the violations could be repeated.

The Department agrees that the language in the Proposed Guidance was ambiguous and modifies the Guidance to address this issue. The final Guidance clarifies that for violation to be classified as repeated, it must be based upon a separate set of facts from those underlying the prior violation. Although the Department does not foresee a scenario along the lines of the one envisioned by the commenter (in part because violations investigated by different agencies are less likely to be substantially similar), the new language clarifies that this scenario would not give rise to a repeated violation.

iv. Violation Committed by the Contractor (Formerly "Company-Wide Consideration")

Under the Proposed Guidance, the determination of a repeated violation takes a company-wide approach; that is, a prior violation by any establishment of a multi-establishment company can render subsequent violations repeated, provided the other relevant criteria are satisfied. Several labor unions and employee-advocacy groups expressed strong support for this approach. One employer association expressed opposition to this approach, arguing that large companies often have disparate components that are managed independently. Finally, three commenters suggested that the Department clarify the scope of "company-wide" and "establishment."

The Department retains this provision in the Guidance and clarifies that "company-wide" includes any

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occurrence of a prior violation even if the Labor Law decision related to the prior violation was not disclosed by the contractor but was instead identified by the ALCA using government enforcement databases.

[64] This modification of the guidance on repeated violations does not, however, affect the contractor's disclosure requirements. The disclosure requirements for violations that involve successive Labor Law decisions are discussed in section II(B)(4) of the Guidance and the preamble section-by-section analysis.

violations committed by the same legal entity. By using the term "establishment" in the phrase "multi-establishment company," the Guidance simply means a physical location where the contractor operates, such as an office, factory, or construction worksite. Thus, for the purposes of determining whether a violation is repeated, prior violations that occurred at different physical locations will be considered as long as they were committed by the same legal entity.

This approach is consistent with the Order, which uses the term "entity" in its requirement that the Department's definition to take into account "whether the entity has had one or more additional violations of the same or a substantially similar requirement in the past 3 years." Order, section 4(b)(i)(B)(2). This is also consistent with the manner in which the Federal agencies administering the two statutory regimes that currently assess "repeated" violations—the FLSA and the OSH Act—evaluate repeated violations. In short, this principle simply affirms that all violations by a contractor will be considered in assessing whether the contractor committed repeated violations.

v. Substantially Similar Violations

The Proposed Guidance provided a definition for how to determine whether violations are "substantially similar" for the purposes of classifying a later violation as "repeated." The Proposed Guidance included a general principle and illustrative examples. It stated that substantially similar does not mean "exactly the same"; rather, two things may be substantially similar where they share "essential elements in common." 80 FR 30574, 30587 (internal citation omitted). It further noted that "[w]hether a violation is 'substantially similar' to a past violation turns on the nature of the violation and underlying obligation itself." *Id.* The Proposed Guidance then provided examples of how this general principle applies in the context of the various Labor Laws. The Department specifically sought comment regarding this definition.

General Comments

Several labor unions and other employee advocacy groups expressed general support for the way that the Proposed Guidance addressed substantially similar violations. In contrast, employer groups and advocates argued that the Department's proposed guidance on these violations was too broad or too vague, particularly in the context of those Labor Laws that concern equal employment opportunity and nondiscrimination. One commenter representing industry interests argued that repeated violations should be limited to the same type of violation of the same statute.

In response to concerns that the guidance on the meaning of "substantially similar" was insufficiently clear, the final Guidance, rather than proceeding by way of a general definition and statute-specific examples, sets forth a statute-specific, exhaustive list of violations that are substantially similar to each other, similar to the Department's statute-specific guidance on serious and willful violations. This list largely tracks the examples that were presented in the Proposed Guidance, but some changes have been made, as noted below. The Department believes that this approach will increase clarity and lessen ambiguity regarding the classification of repeated violations.

Under the final Guidance, as in the Proposed Guidance, certain violations may be substantially similar to each other even though they arise under different statutes. While the Department recognizes that there may be violations that will be "repeated" under the Guidance that are different in character or degree, such violations will often point to underlying compliance practices in a company that the Order seeks to eliminate from the performance of Federal contracts. An overly narrow definition will fail to capture many violations that could help identify such practices. While any definition of "substantially similar" would likely draw criticism for both over-inclusiveness and under-inclusiveness, the Department believes that the definitions in the final Guidance strike the appropriate balance. The Department also believes that these definitions are sufficiently clear for ALCAs to be able to apply them.

The Department did not receive specific comments on the definitions of "substantially similar" for violations of the FLSA, DBA, SCA, Executive Order 13658, and MSPA, or on its proposal to treat as substantially similar any two violations involving retaliation, any two recordkeeping violations, or any two failures to post required notices. The Department did receive comments on the definitions of "substantially similar" for other Labor Laws, as discussed below.

Family and Medical Leave Act

One advocacy organization commenter addressed the treatment of repeated violations of the FMLA. The individual notice provisions of the FMLA require that when an employee requests leave for a qualifying reason, the employer must notify the employee of certain rights and other information. The commenter argued that violations of this notice provision should be treated as substantially similar to other FMLA violations, such as interference and discrimination, because the FMLA's individual notice provisions relate to a specific leave request and an individual's ability to exercise his or her FMLA rights.

The Department declines to change this aspect of the definition of repeated violations. The general notice and individual notice requirements are both included in the same provision of the FMLA regulations. 29 CFR 825.300. This provision is separate from the regulatory provisions governing interference and discrimination. While the Department agrees that a violation of individual notice requirements could potentially be tied to, or result in, interference and discrimination, this is also true for violations of the general notice provisions. The Department believes that notice requirements are sufficiently different from an employer's actual failure to provide leave or other benefits that they should not be considered substantially similar to those violations in the context of repeated violations.

National Labor Relations Act

The Proposed Guidance stated, by way of example, that any two violations of section 8(a)(3) of the NLRA would be substantially similar to each other, but would not be substantially similar to violations of section 8(a)(2). The Department did not provide further guidance on the circumstances under which other NLRA violations would be substantially similar. Consistent with the Department's decision to set forth statute-specific definitions rather than examples, the final Guidance states that any two violations of the same numbered subsection of section 8(a) of the NLRA, which lists unfair labor practices by employers, will be substantially similar. The Department also notes that any two violations of the NLRA (or any of the Labor Laws) that involve retaliation are substantially similar.

One labor organization commenter argued that the amendment of an NLRB complaint should constitute a separate administrative merits determination for the purpose of determining whether an employer has committed a repeated violation. The commenter noted that sometimes the NLRB will amend a complaint rather than issuing a new one where an employer has committed violations relating to an ongoing labor dispute over a long period of time.

The final Guidance does not incorporate this suggestion. First, a pending and contested NLRB complaint cannot serve as a prior violation for the purposes of a repeated violation determination. As discussed above, only an uncontested or adjudicated Labor Law decision can constitute a prior violation. After adjudication or settlement of an NLRB complaint, the complaint typically would not be amended. Additionally, because complaints can be amended for numerous reasons other than those identified by the commenter, the Department believes that it would be impractical to require ALCAs to examine complaints in order to determine when and why they were amended. As such, a single NLRB complaint, regardless of whether it is amended, will constitute a single administrative merits determination.

The same commenter also recommended that the Department treat violations of section 8(a)(1), which prohibits employers from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in section 7 of the NLRA, as substantially similar to violations of section 8(a)(3), which generally prohibits employers from discriminating in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in a labor organization, for the purposes of determining whether a violation was repeated. The Department declines to adopt this suggestion, as it believes that it is overbroad in scope and could result in dissimilar violations being classified as repeated.

Anti-Discrimination Labor Laws[65]

Some employer-group commenters expressed concern about the application of the definition to the anti-discrimination laws. Under the Proposed Guidance, such violations would be substantially similar if they involved the same or an overlapping protected status, even if they did not involve the same employment practice. One noted that, for example, under the definition in the Guidance, if a company employed a hiring test resulting in a disparate impact on women, and within 3 years, an individual manager in a different department engaged in sexual harassment, the company would be found to have committed repeated violations.

In response to these comments, the Department has made modifications to narrow the definition of repeated violations in the discrimination context. For purposes of the anti-discrimination Labor Laws, violations are substantially similar if they involve (1) the same protected status, and (2) at least one of the following elements in common: (a) The same employment practice, or (b) the same worksite. In nonsubstantive changes, the Department has removed the reference to "overlapping" protected statuses and the list of examples of protected statuses, but has clarified that violations are considered to involve the same protected status as long as the same status is present in both violations, even if other protected statuses may be involved as well. For the purpose of determining whether violations involve the same worksite, the same definition of "worksite" that was used in the discussion of the 25 percent criterion for a serious violation applies, except that any two or more company-wide violations are considered to involve the same worksite. The Department believes that this narrower definition will better capture violations that are substantially similar to each other.

Also, a number of employee advocates argued in their comments that discrimination on the basis of sex, gender identity, sexual orientation, and pregnancy should be considered to be "the same or overlapping" protected statuses for the purpose of determining whether a violation was repeated. These commenters asserted that discrimination on the basis of these characteristics typically arises out of gender-based stereotypes and that it would be appropriate to treat such violations as substantially similar for purposes of the Order.

The Department has incorporated this suggestion in part. The treatment of discrimination on the basis of pregnancy as a type of sex discrimination is consistent with Title VII as amended by the Pregnancy Discrimination Act. *See* 42 U.S.C. 2000e(k). Additionally, the treatment of discrimination on the basis of gender identity (including transgender status) as a type of sex discrimination is consistent with the views of the EEOC, the Department, the Department of Justice, and two Federal courts of appeals.[66] With regard to discrimination on the basis of sexual orientation, some courts have recognized in the wake of *Price Waterhouse* v. *Hopkins*[67] that discrimination "because of sex" includes discrimination based on sex stereotypes about sexual attraction and sexual behavior[68] or about deviations from "heterosexually defined gender norms."[69] In addition, the EEOC has concluded that Title VII's prohibition of discrimination "because of sex" includes sexual orientation discrimination because discrimination on the basis of sexual orientation necessarily involves sex-based considerations.[70] The Department has taken the position that discrimination on the basis of sex includes, at a minimum, sex discrimination related to an individual's sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes.[71] Consistent with recent regulatory activity,[72] the Department will continue to monitor the developing law on sexual orientation discrimination as sex discrimination under Title VII and will interpret E.O. 11246's prohibition of sex discrimination in conformity with Title VII principles.

In recognition of Title VII's explicit incorporation of pregnancy discrimination as a type of sex discrimination and the Department's previously articulated positions on gender identity discrimination related to sexual orientation based on gender stereotyping, the Department clarifies in the final Guidance that violations involving discrimination on the bases of sex, pregnancy, gender identity

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[65] The term "anti-discrimination Labor Laws" refers to Title VII, section 503 of the Rehabilitation Act of 1973, the ADA, the ADEA, section 6(d) of the FLSA (known as the Equal Pay Act, 29 U.S.C. 206(d)), Executive Order 11246 of September 24, 1965, the Vietnam Era Veterans' Readjustment Assistance Act of 1972, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

[66] *See Macy* v. *Holder*, Appeal No. 0120120821, 2012 WL 1435995 (EEOC 2012), Dep't of Labor, Ofc. of Fed. Contract Compliance Programs, Final Rule, Discrimination on the Basis of Sex, 81 FR 39108, 39118–19 (June 15, 2016) ("OFCCP Sex Discrimination Final Rule"); Memorandum from Attorney General Eric Holder to United States Attorneys and Heads of Department Components (Dec. 15, 2014), *https://www.justice.gov/file/188671/download*; *Glenn* v. *Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith* v. *City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004).

[67] 490 U.S. 228 (1989).

[68] *See Videckis* v. *Pepperdine Univ.*, No. CV 15–00298, 2015 WL 8916764, at *5 (C.D. Cal. Dec. 15, 2015).

[69] *Isaacs* v. *Felder Servs.*, No. 2:13cv693–MHT, 2015 WL 6560655, at *4 (M.D. Ala. Oct. 29, 2015) (internal quotation omitted).

[70] *Baldwin* v. *Dep't of Transp.*, Appeal No. 0120133080, 2015 WL 4397641, at *5 (EEOC 2015). For a more comprehensive discussion on the state of the law on these issues, please see the OFCCP Sex Discrimination Final Rule cited above; see also Dep't of Labor, Ofc. of the Sec'y, Notice of Proposed Rulemaking, Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act, 81 FR 4494, 4507 (Jan. 26, 2016) ("CRC WIOA NPRM").

[71] OFCCP Sex Discrimination Final Rule, 81 FR at 39118; CRC WIOA NRPM, 81 FR at 4508–09.

[72] *See id.*

(including transgender status), and sex stereotyping (including discrimination related to sexual orientation based on such stereotyping) are considered to involve discrimination on the basis of the same protected status for the purpose of determining whether two violations are substantially similar. While the use of the term "same" does not intend to suggest that all of these forms of discrimination are identical, these violations are sufficiently similar to be classified as substantially similar violations under the Order.

Finally, one union commenter argued that any time an employer commits multiple discrimination violations, regardless of whether they involve the same protected status or employment practice, they should be considered repeated violations. The Department declines to adopt this suggestion. Violations of anti-discrimination requirements are often fact-intensive and the Department does not believe it would be appropriate to treat all such violations as substantially similar absent the additional factors described above.

Alternative Proposal

A few commenters, including unions and other employee advocates, argued that the scope of repeated violations should be expanded to include any time a contractor has violated any one of the covered Labor Laws five times in the last 3 years. The final Guidance does not adopt this suggestion because it is inconsistent with the Order's specific direction that a determination of a repeated violation be based on "the same or a substantially similar requirement." However, the Department notes that multiple violations that are not substantially similar to each other may be properly considered in an evaluation of whether such violations show sufficient disregard for the Labor Laws that they constitute pervasive violations.

3. Willful Violations

The Proposed Guidance set forth several classification criteria for determining whether a violation of one of the Labor Laws is a willful violation under the Order. 80 FR 30585. Under the Proposed Guidance, a willful violation was specifically defined for five Labor Laws—the OSH Act or an OSHA-approved State Plan; the FLSA (including the Equal Pay Act), the ADEA, Title VII, and the ADA. Under these statutes, the term "willful" has a well-established meaning or an analogous statutory standard exists that is consistent with the Order. The Proposed Guidance included a residual criterion for all other Labor Laws, stating that a violation would be willful if

> the findings of the relevant enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor . . . knew that its conduct was prohibited by any of the Labor Laws or showed reckless disregard for, or acted with plain indifference to, whether its conduct was prohibited by one or more requirements of the Labor Laws.

Id.

a. OSH Act or OSHA-Approved State Plan Violations Enforced Through Citations or Equivalent State Documents

The Proposed Guidance set forth a specific definition of a willful violation for the OSH Act and OSHA-approved State Plans. It stated that OSH Act and OSHA-approved State Plan violations would be willful if the relevant enforcement agency had designated the citation as willful or any equivalent State designation. 80 FR 30585.

As noted above, a few worker-advocate commenters expressed concern that the Proposed Guidance's definitions of serious, repeated, willful, and pervasive violations did not sufficiently account for OSH Act violations that are not enforced through citations, such as retaliation violations. As a result of these comments, the Department has clarified this point of ambiguity by dividing OSH Act and OSHA-approved State Plan violations into two categories: Citation OSHA violations and non-citation OSHA violations. For the former, an OSHA or OSHA-approved State Plan designation of "willful" (or an equivalent State designation) controls the classification of the violation under the Order. For the latter, a violation is willful if it meets the residual standard for a willful violation—knowledge, reckless disregard, or plain indifference.

In a nonsubstantive change, the final Guidance has also deleted language stating that OSH Act and OSHA-approved State Plan citations designated as willful are willful violations under the Order only if the designation has not been subsequently vacated. This language is unnecessary in light of the broader statement in the final Guidance that if a Labor Law decision or portion thereof that would otherwise cause a violation to be classified as serious, repeated, willful, or pervasive is reversed or vacated, then the violation will not be classified as such under the Order.

b. Violations of the Minimum Wage, Overtime, and Child Labor Provisions of the FLSA

The Proposed Guidance stated that a violation of the FLSA would be willful if an administrative merits determination sought or assessed civil monetary penalties for a willful violation, or there was a civil judgment or arbitral award or decision finding the contractor or subcontractor liable for back wages for greater than 2 years or affirming the assessment of civil monetary penalties for a willful violation. 80 FR 30586. As in the case of OSH Act violations, these criteria did not sufficiently account for all violations of the FLSA because these criteria apply only to the FLSA's provisions on minimum wage, overtime, and (in the case of civil monetary penalties) child labor. *See* 29 U.S.C. 216(e)(1)(A)(ii), 216(e)(2), 216(e)(3)(C), 255. Accordingly, the final Guidance clarifies that these criteria will only be used to classify these violations of the FLSA, while other violations of the FLSA—such as retaliation, *see* 29 U.S.C. 215(a)(3)—will be classified using the residual criterion.

One commenter also expressed concern that it would be inappropriate to classify an FLSA violation as willful due to the assessment or award of more than 2 years of back wages because there are occasions when employers agree to pay back wages for greater than 2 years even when an FLSA violation is not willful. The Department declines to change the Guidance in response to the above comment. Under the FLSA, WHD's standard practice is to use an investigative period of up to 2 years for non-willful violations and up to 3 years for willful violations, and to assess back wages for the relevant investigative period. Thus, WHD's standard practice is to assess no more than 2 years of back wages in a form WH–56 unless the agency makes an investigative finding that the violation was willful.

As a related matter, however, the Department has clarified that for civil judgments and arbitral awards or decisions under the FLSA's minimum wage and overtime provisions, a violation will only be classified as willful under the Order if the Labor Law decision includes a finding that the violation was willful. This is because in such litigation, the 2-year limit for non-willful violations only limits the recovery to the 2 years prior to the commencement of the litigation. *See* 29 U.S.C. 255. It does not affect the recovery of additional back wages if the violations continue while the litigation is pending. If the violations continue after the commencement of litigation, back wages can ultimately be awarded for more than 2 years—for up to 2 years prior to the commencement of the litigation, plus any additional period of time from the date the litigation is initiated until final judgment. Thus, because a non-willful violation of the FLSA's minimum wage or overtime provisions reflected in a civil judgment or arbitral award or decision may result in more than 2 years of back wages, the final Guidance clarifies that whether such violations are willful under the Order depends on whether the court or arbitrator(s) makes a finding of willfulness—and does not depend on the number of years of back wages awarded.

c. Violations of the ADEA

The Proposed Guidance stated that violations of the ADEA are willful if the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded liquidated damages. One commenter asserted that an ADEA violation might be willful even if liquidated damages are not awarded, and therefore suggested that the Department apply the willfulness residual criterion to ADEA violations in addition to the liquidated damages criterion. The Department declines to expand the application of the residual criterion to cover the ADEA. As discussed below, in the discussion of the residual criterion generally, an expansion of the residual criterion is unnecessary and would not further the efficient administration of the Order.

d. Title VII and the ADA

One commenter suggested that the statute-specific criteria for willful violations under Title VII and the ADA did not sufficiently account for violations involving retaliation, and suggested adding the words "or retaliatory" to describe the types of violations that could involve punitive damages. The Department, however, believes that the language in the Proposed Guidance sufficiently accounts for retaliation cases. The criteria specified in the Guidance for willful violations under Title VII and the ADA already applies to their anti-retaliation provisions. *See* 42 U.S.C. 1981a(b)(1) (stating that punitive damages may be awarded for any violation of Title VII or the ADA in which the employer acts with malice or reckless indifference). As such, no changes to the Guidance are necessary to clarify that retaliation violations of these statutes may be classified as willful if they meet the listed criteria.

e. Any Other Violations of the Labor Laws (Formerly "Other Labor Laws")

The Proposed Guidance stated that for any Labor Laws for which a specific criterion for willfulness was not listed, a violation would be willful if

> the findings of the relevant enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor . . . knew that its conduct was prohibited by any of the Labor Laws or showed reckless disregard for, or acted with plain indifference to, whether its conduct was prohibited by one or more requirements of the Labor Laws.

80 FR 30586.

Several employee advocates argued that this residual standard should apply to all of the Labor Laws, including the five statutes for which the Guidance also includes statute-specific criteria (OSH Act/OSHA-Approved State Plans, FLSA, ADEA, Title VII, ADA). These commenters argued that the statute-specific criteria would not necessarily capture all violations of those statutes in which the employer engaged in willful conduct.

The Department declines to broaden the application of the residual standard to all of the Labor Laws. The purpose of listing specific standards for the five laws that already incorporate a concept of willfulness (or, in the case of Title VII and the ADA, the related standard of malice or reckless indifference) is to further the efficient administration of the Order. Moreover, the Department believes it is inappropriate for ALCAs to second-guess the decisions of enforcement agencies, arbitrators, or courts as to whether or not a violation was willful. Accordingly, for Labor Laws with an existing willfulness framework, violations are only willful under the Order if the relevant Labor Law decision explicitly includes such a finding.[73] In contrast, for Labor Laws that do not have a willfulness framework, an ALCA may examine the relevant Labor Law decision to determine whether it is readily ascertainable from the decision that the violation was willful under the residual criterion.

A number of industry commenters expressed concern that the Proposed Guidance's residual criterion is too vague, overbroad, and would not be applied correctly or consistently. Several of these commenters expressed particular concern about how prime contractors would be able to apply this standard when assessing violations by subcontractors.

The final Guidance retains the residual criterion for willful violations. While the Department agrees that a determination of knowledge, reckless disregard, or plain indifference will depend on the facts of individual cases, it believes that ALCAs will be able to implement this standard with assistance of this Guidance and its appendices. This standard is well-established, having been applied for many years by courts and administrative agencies in the context of the OSH Act, FLSA, and ADEA. The Department is confident that it can be applied in the context of other Labor Laws as well. The Department also notes that the key language of the residual criterion comes from the Order itself, which states that where no statutory standards exist, the standard for willfulness should take into account "whether the entity knew of, showed reckless disregard for, or acted with plain indifference to the matter of whether its conduct was prohibited by the requirements of the [Labor Laws]." Order, section 4(b)(i)(B)(3). The residual criterion in the Proposed Guidance conforms to the Order's text, and the Department declines to narrow it further.

One industry commenter argued that this definition was too broad and could in some cases be counterproductive, such as by penalizing contractors for having a written policy in place which could in turn be used as evidence of the contractor's knowledge of its legal requirements. While the Department recognizes the commenter's concerns, an employer's deviation from a written policy is plainly evidence that the employer was aware of its legal obligations but chose to ignore them. The Department believes that employers have sufficient existing incentives to maintain written policies such that classifying a violation as willful under these circumstances will not cause employers to forgo written policies.

Another industry commenter expressed concern that one of the examples of a non-willful VEVRAA violation in Appendix B of the Proposed Guidance (now Appendix C in the final Guidance) described a disparate impact case, which the commenter believed could create confusion by suggesting that a disparate impact case under certain circumstances could be a willful violation. The Department agrees that disparate impact cases under VEVRAA, absent unusual circumstances, will not be willful violations under the Order, and the intent of the example is to illustrate just that.

The Department believes that the final FAR rule addresses the industry commenters' concerns about application of the residual willfulness standard by prime contractors. As noted in section V of this section-by-section analysis, below, the final FAR rule clarifies that subcontractors will make their detailed

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[73] Some worker-advocacy commenters noted that the EEOC does not assess punitive or liquidated damages at the reasonable-cause stage. The Department recognizes that this means EEOC reasonable cause determinations will not provide a basis for finding a violation "willful."

Labor Law disclosures directly to the Department, and will receive advice about their record of compliance from DOL which they may provide to contractors. Under this structure, contractors will be able to rely on the Department's classification determinations rather than making the classification determinations themselves.

The Department further emphasizes that a determination of willfulness will only be made if it is readily ascertainable from the findings of the Labor Law decision. ALCAs will not examine case files or evidentiary records in order to make assessments of willfulness. Where the findings of the Labor Law decision do not include any facts that indicate that a violation was willful, the violation will not be considered willful under the Order.

f. Table of Examples

The Department has updated the table of examples to reflect the changes in the final Guidance.

g. Other Comments on Willful Violations

Some employer groups also argued that the definition of willful violations fails to account for the fact that employers sometimes must deliberately commit a violation to obtain review of an agency's ruling. They noted that, for example, employers must violate section 8(a) of the NLRA by refusing to bargain with a union in order to obtain appellate review of the NLRB's determination that a group of employees is an appropriate bargaining unit. Two of these groups asserted that such violations are "technical" violations that should not be considered willful or even to be violations at all.

The Department declines to adopt a bright-line rule under which so-called "technical" violations would not be considered violations or would not be classified as willful. A contractor's belief that it had justifiable reasons for committing a Labor Law violation is best considered as a possible mitigating factor during the weighing process described in section III(B) of the Guidance.

Some industry commenters also suggested that a violation should only be classified as willful where the violation has been "adjudicated." According to these commenters, agencies will often initially allege that an employer's actions are willful or knowing, even though they may not be. For example, OSHA might initially designate a violation as willful in a citation, only to eventually retreat from this position. Therefore, these commenters suggested, willful violations should be limited solely to those administrative merits determinations made by a neutral fact-finder after the employer has been accorded the opportunity for a hearing.

For the same reasons the Department has provided in support of its use of non-adjudicated administrative merits determinations generally, the Department declines to limit willful violations to adjudicated proceedings. However, as discussed above under "Effect of reversal or vacatur of basis for classification," the final Guidance clarifies that a violation should not be classified as willful if an agency has rescinded or vacated the aspect of an administrative merits determination upon which a willfulness determination was based.

4. Pervasive Violations

The Proposed Guidance defined pervasive violations to be violations that reflect a basic disregard by the contractor for the Labor Laws as demonstrated by a pattern of serious or willful violations, continuing violations, or numerous violations. *See* 80 FR 30588. The Proposed Guidance also included additional factors and examples.

In General

Several employer groups expressed concern about the Proposed Guidance's explanation of pervasive violations. These groups generally argued that the definition was not sufficiently specific and would not be applied consistently. Some of these commenters argued that the category of pervasive violations should be eliminated entirely and that the analyses relevant to pervasive violations (such as the involvement of upper management) should instead be incorporated into the overall assessment of a contractor's responsibility. Some argued that the definition should instead be based on more "objective" criteria such as numeric thresholds. One commenter, the Equal Employment Advisory Council, urged the Department to amend the definition such that only a contractor with a "clear record of violations that unambiguously demonstrates a lack of commitment to compliance responsibilities" may be found to have pervasive violations. In contrast, employee advocates and civil rights groups generally supported the Department's definition of pervasive violations. One labor union commenter suggested that a large employer's violations be treated as pervasive if multiple violations occur at a particular targeted facility, and that multiple violations be treated as pervasive if they impact at least 25 percent of the employees in the portion of the workforce targeted by the employer.

The Department declines to eliminate the definition of pervasive. The Order specifically instructs the Department to define a classification of "pervasive" violations. Moreover, the Department disagrees that the inquiry into whether a contractor has pervasive violations is identical to the determination of whether that contractor is responsible. In particular, a contractor with pervasive violations may nonetheless ultimately be found responsible, depending on the existence of mitigating factors and, potentially, the adoption of a labor compliance agreement.

The Department also declines to make significant modifications to the definition of pervasive or to adopt bright-line criteria. In the Department's view, this definition necessarily must be flexible. Notwithstanding the utility of the definitions of serious, repeated, and willful violations, the Department recognizes that violations falling within these classifications may still vary significantly in their gravity, impact, and scope. Thus, it would not be reasonable to require a finding of "pervasive" violations based on a set number or combination of these violations. Similarly, the Department declines to adopt rigid criteria that would mandate, for example, that any company of a certain size with at least a certain designated number of serious, repeated, or willful violations would be deemed to have pervasive violations.

The lack of a bright-line test is not unique to the definition of pervasive violations. The FAR provides contracting officers with significant flexibility when assessing other elements of a contractor's responsibility and past performance. *See* FAR 9.104–1, 42.1501. For example, as a part of the responsibility determination, contracting officers must consider a number of factors, including "integrity and business ethics" and whether the contractor has "the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them." *Id.* 9.104–1. Similarly, in past performance evaluations, contracting officers consider factors such as whether the contractor has exhibited "reasonable and cooperative behavior and commitment to customer satisfaction" and "business-like concern for the interest of the customer." *Id.* 42.1501(a). Finally, during the suspension and debarment process, a suspending and debarring official has the discretion not to debar a contractor based on a holistic evaluation of multiple factors, such as the contractor's cooperation, remedial measures, and effective internal control systems, which may demonstrate a contractor's responsibility. *See id.* 9.406–1(a). Accordingly, the Department does not believe that it is necessary or appropriate to adopt rigid numerical criteria to define pervasive. The Department notes, however, that violations will not be classified as pervasive if they are minimal in nature, given that this category seeks to encompass those contractors who act with a basic disregard for their obligations under the Labor Laws. To that end, the Department expects that this classification will be applied sparingly.

Size of the Contractor

The Order provides that the standards for pervasive should take into account

> the number of violations of a requirement or the aggregate number of violations of requirements in relation to the size of the entity.

Order, section 4(b)(i)(B)(4). The Proposed Guidance stated that whether a contract is found to have pervasive violations "will depend on the size of the contractor . . ., as well as the nature of the violations themselves." 80 FR 30574, 30588. The Proposed Guidance specifically requested comments by interested parties regarding how best to assess the number of a contractor's violations in light of its size.

One industry commenter requested clarification on how the size of a contractor will impact the determination of whether violations are pervasive, and on the meaning of the terms "small," "medium-sized," and "large" within the meaning of the examples set out in the Guidance. In contrast, several employee advocates cautioned against giving undue weight to a company's size when assessing whether violations are pervasive. These commenters argued that while smaller companies with numerous violations clearly should be considered pervasive violators, the size of a large company alone should not excuse its violations of Labor Laws.

The Department declines to modify the definition of pervasive either to eliminate or to further specify criteria for measuring company size. The Department does not eliminate the company-size factor because, as noted above, the Order explicitly requires the Department to take this factor into account in the definition of pervasive. Order, section 4(b)(i)(B)(4). This makes sense because, as the Proposed Guidance notes, larger companies can be expected to have a greater number of violations overall than smaller companies. The Department agrees, however, that an employer's size does not automatically excuse any violations. Rather, the size of the employer will be one factor among many assessed when considering whether violations are pervasive. Likewise, the Department declines to establish specific criteria for how company size will affect the determination of pervasive violations. As noted above, the violations that ALCAs will consider and assess will vary significantly, making the imposition of bright-line rules for company size inadvisable. However, the Department has modified the examples in the Guidance so that each example notes the number of employees for the contractor. These examples are not intended to serve as minimum requirements, but simply as illustrations of circumstances under which violations may be classified as pervasive.

Involvement of Higher-Level Management

The Proposed Guidance also explained that a violation is more likely to be pervasive when higher-level management officials are involved in the misconduct. This is because such involvement signals to the workforce that future violations will be tolerated or condoned. Involvement of high-level managers may also dissuade workers from reporting violations or raising complaints. The Guidance also noted that if managers actively avoid learning about Labor Law violations, this may also indicate that the violations are pervasive.

While worker-advocacy groups supported the inclusion of the higher-level management factor, some employer groups asked the Department to clarify what constitutes higher-level management and expressed concern that this criterion would be applied to low-level management. For example, one commenter suggested that discrimination or harassment by a "rogue" manager should not result in a determination that the violations are pervasive if the company had strong nondiscrimination and anti-harassment policies in place and takes swift and appropriate remedial action upon learning of the manager's actions. Another commented that the Guidance should add that managers need to be trained only to the extent needed to perform their managerial duties.

By using the term "higher-level management," the Department did not suggest that the involvement of any employees with managerial responsibilities would be deemed a pervasive violation. The Department agrees that a violation is unlikely to be classified as pervasive where the manager involved is low-level (such as a first-line supervisor), acting contrary to a strong company policy, and the company responds with appropriate remedial action, and the Department has clarified this point in the final Guidance. The Department further notes that in the weighing step of the assessment process (discussed below), an ALCA will consider a contractor's remedial action as an important factor that may mitigate the existence of a violation.

B. Weighing Labor Law Violations and Mitigating Factors (Step Two) (Formerly "Assessing Violations and Considering Mitigating Factors")

As discussed above, an ALCA's assessment of and advice regarding a contractor's Labor Law violations involves a three-step process. In the classification step, the ALCA reviews all of the contractor's violations to determine if any are serious, repeated, willful, and/or pervasive. In the weighing step, the ALCA then analyzes any serious, repeated, willful, and/or pervasive violations in light of the totality of the circumstances, including any mitigating factors that are present. In the final advice step, the ALCA provides written analysis and advice to the contracting officer regarding the contractor's record of Labor Law compliance, and whether a labor compliance agreement or other action is needed.

Based on the comments and additional deliberations, the Department modifies the final Guidance to improve the clarity and organization of the weighing section. For example, the Department has changed the reference in the Proposed Guidance to violations that "raise particular concerns" to "factors that weigh against a satisfactory record of Labor Law compliance." The Department has also included further explanation of the process to clarify that ALCAs do not make findings that specific violations are "violations of particular concern." Rather, the ALCA proceeds with a holistic review that considers the totality of the circumstances and considers all of the relevant factors.

A summary of the comments, the Department's responses, and any changes adopted in the final Guidance are set forth below.

ALCA Capacity and Training

A number of commenters expressed concern about the capacity of ALCAs to complete their duties effectively. One employer representative argued that ALCAs will not be equipped to analyze employer submissions regarding mitigating factors. This commenter believed that contractors will likely attempt to show mitigating circumstances by submitting evidence in an effort to re-litigate whether a violation actually occurred or whether the amount of damages awarded was correct. Contractors will also make legal arguments about "good faith" and whether remediation was appropriate. The commenter asserted that ALCAs may have difficulty sifting through the legal complexities of these submissions.

As a related matter, some commenters stressed the importance of adequate training and support for ALCAs. For example, several labor unions highlighted the need for ALCA training, and suggested such training should include a role of unions and other interested parties. A number of employer representatives argued that the Federal Government likely did not have sufficient resources to provide enough staff and training to prevent bottlenecks in evaluating contractor integrity and business ethics.

The Department has considered these comments and, as a general matter, believes that they support the Department's development of this Guidance to include specific guidelines for classifying Labor Law violations and for evaluating the totality of the circumstances. The Department's intent with this Guidance has been to create a document that contains appropriate context and narrative description to assist ALCAs and other interested parties with carrying out their responsibilities under the Order.

In response to these comments, the Department has also added language to the Guidance that clarifies the role of ALCAs in assessing contractors' records of compliance. The Guidance clarifies that in classifying Labor Law decisions, ALCAs consider "information that is readily ascertainable from the Labor Law decisions themselves." Guidance, section III(A). And, while mitigating circumstances will be considered, the Department has clarified in the Guidance that re-litigation of a disclosed Labor Law decision is not appropriate. *See id.* ("ALCAs do not second-guess or re-litigate enforcement actions or the decisions of reviewing officials, courts, and arbitrators."). The Department has also tailored the "good faith" mitigating factor to situations where "the findings in the relevant Labor Law decision" support the contractor's argument, so that the consideration of good faith does not become a far-reaching effort to re-litigate the decision itself. *See id.* section III(B)(1)(f).

Finally, the Department strongly agrees with the comments on the importance of adequate training and support for ALCAs, and the Department—in coordination with the Office of Management and Budget—will provide such training as part of the implementation of the FAR rule and the Guidance.

Exercise of Discretion

Numerous employer organizations argued that the guidelines for weighing violations of particular concern and mitigating factors are subjective and ambiguous, which may lead to inconsistent determinations between ALCAs and across agencies. These groups argued that the Proposed Guidance gave ALCAs and contracting officers too much discretion in how to weigh the various factors and whether to require negotiation of a labor compliance agreement.

The Department rejects the argument that the weighing process will involve improper subjective decision-making by ALCAs or contracting officers. These assessments will necessarily involve exercising judgment and discretion, but the exercise of judgment and discretion are a fundamental part of the pre-existing FAR responsibility determination.[74]

As discussed above, the FAR provides contracting officers with significant flexibility when assessing other elements of a contractor's responsibility. *See* FAR 9.104–1. Contracting officers must consider a number of factors, such as "a satisfactory performance record," "integrity and business ethics," and whether the contractor has "the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them." *Id.* The test for debarment similarly relies on a holistic evaluation of multiple factors, such as the contractor's cooperation, remedial measures, and effective internal control systems. *See* FAR 9.406–1(a).

The Department does not believe that the new requirements and processes that implement the Order require the exercise of more discretion or subjectivity than these existing determinations. To the contrary, the final FAR rule and the final Guidance contain detailed guidelines and examples to assist ALCAs and contracting officers in their respective roles.

The Department also notes that the Order expressly requires the FAR and the Department to create processes to ensure government-wide consistency in the implementation of the Order. ALCAs will work closely with the Department during more complicated determinations, and the Department will be able to assist ALCAs in comparing a contractor's record with records that have in other cases resulted in advice that a labor compliance agreement is needed, or that notification of the suspending and debarring official is appropriate. Through its work with enforcement agencies, the Department also will provide assistance in analyzing whether remediation efforts are sufficient to bring contractors into compliance with Labor Laws and whether contractors have implemented programs or processes that will ensure future compliance in the course of performance of Federal contracts. This level of coordination will ensure that ALCAs (and through them, contracting officers), receive guidance and structure.

Concern About Delays in the Procurement Process

Industry commenters raised various concerns about burdens associated with the assessment by ALCAs of a contractor's Labor Law violations, citing potential regulatory bottlenecks and delays. For example, commenters opined that an awarding agency's ALCA could disagree with another agency's ALCA on the impact of a particular violation on the contractor's responsibility—or that an ALCA could disagree with its own agency's contracting officer, delaying one agency's award until the differences could be resolved.

The Department has carefully considered these comments, but finds them to take issue largely with the structure mandated by the Order itself and not with any specific aspect of the Department's Guidance. The plain text of the Order requires contracting officers to consider Labor Law violations as part of the responsibility determination and requires contracting officers to consult with ALCAs as a part of this process. Order, section 2(a)(iii).

The Department also notes that the FAR Council has structured the assessment and advice process to limit the risk of delay. As discussed below, the final FAR rule maintains the default 3-day period for an ALCA to provide advice. FAR 22.2004–2(b)(2)(i). It also retains the requirement that if the contracting officer has not received timely advice, the contracting officer must proceed with the responsibility determination "using available information and business judgment." *Id.* 22.2004–2(b)(5)(iii). The Department believes that this authority granted to contracting officers will allow contracting officers to proceed without delay where necessary.

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[74] *See Impresa Construzioni Geom. Domenico Garufi* v. *United States,* 238 F.3d 1324, 1334–35 (Fed. Cir. 2001) ("Contracting officers are generally given wide discretion in making responsibility determinations and in determining the amount of information that is required to make a responsibility determination." (internal quotations marks and citations omitted)).

1. Mitigating Factors That Weigh in Favor of a Satisfactory Record of Labor Law Compliance

The Order instructs contracting officers to afford contractors the opportunity to disclose any steps taken to come into compliance with Labor Laws. Order, section 2(a)(ii). It also seeks to ensure that ALCAs and contracting officers give appropriate consideration to remedial measures and other mitigating factors when assessing a contractor's record. *See id.* section 4(a)(ii). The Department's Proposed Guidance provided a non-exclusive list of mitigating factors that ALCAs should consider in the weighing process. 80 FR 30574, 30590–91. It stated that remediation efforts—actions to correct the violation and prevent its recurrence—are typically the most important mitigating factor. *Id.* at 30590.

General Comments

A number of unions and employee-advocacy organizations raised concerns with the mitigating factors listed in the Guidance. One commenter stated that the Guidance should not treat circumstances such as "a long period of compliance" or "a single violation" as mitigating factors. It argued that these factors may not provide an accurate assessment of the contractor's behavior, as a single violation may be severe and impactful. The commenter also noted that the low number of violations may be due to infrequent inspections by the enforcement agency during the 3-year period, rather than conduct that actually complies with Labor Laws.

Some worker-advocacy organizations argued that the Guidance should not take into account the number of violations relative to the size of the contractor. These commenters cautioned that size should not be an excuse for a large number of major violations. They further noted that large companies, due to their greater resources, may actually be more capable of preventing and remedying violations than smaller companies.

Similarly, a number of commenters discussed whether a contractor's safety-and-health program should be considered a mitigating factor. Some union and employee-advocacy organizations argued that only certain, qualifying safety-and-health programs should be considered as mitigating factors. They suggested that the contractor must show that its program is being actively and effectively implemented and meets other requirements. For example, some commenters stated that a contractor with repeated or pervasive OSHA violations should not be able to point to its safety-and-health program as a mitigating factor because the violations demonstrate that the employer's safety-and-health programs have not been adequate.

The Department declines to make any substantive changes to the guidance on mitigating factors. In most instances, the number of violations, the period of compliance, the violations relative to size, and the implementation of compliance programs will be important factors in weighing the significance of a contractor's Labor Law violations. In response to the commenters' concerns, the Department notes that the ALCA will weigh a contractor's Labor Law violations based on the totality of the circumstances. For example, it is generally true that a single violation will not lead to a conclusion that the contractor has an unsatisfactory record of Labor Law compliance. However, it is possible that a single violation may merit advice that a labor compliance agreement is needed because of the violation's severity and because the harm has not been remediated. Similarly, concerns about "paper" compliance programs will also be addressed through the ALCAs' consideration of the totality of the circumstances—which may include the adequacy of a compliance program put forth as a mitigating circumstance.

Remediation Efforts

The Proposed Guidance explained that ALCAs should give greater mitigating weight to contractors' remediation efforts when they involve two components: (1) "correct[ing] the violation itself, including by making any affected workers whole" and (2) taking steps to ensure future compliance so that violations do not recur. *See* 80 FR 30574, 30590. The Proposed Guidance stated that the fact that a contractor has entered into a labor compliance agreement should be considered a mitigating factor. *Id.*

Several employer groups stated that the discussion of remediation efforts in the Proposed Guidance was confusing, and they expressed concerns about the extent of their obligations under the Order. In particular, some objected to the Proposed Guidance statement that "in most cases, the most important mitigating factors will be the extent to which the contractor or subcontractor has remediated the violation and taken steps to prevent its recurrence." 80 FR at 30590. In their view, this suggests that ALCAs—through labor compliance agreements—could impose remediation measures that go beyond what is required to comply with the labor law at issue. They also argued that the Proposed Guidance was unclear about what constitutes appropriate remedial measures.

One employer representative, the Equal Employment Advisory Council (EEAC), urged the Department to clarify the Proposed Guidance's reference to "making any affected workers whole." 80 FR at 30590. EEAC suggested that where an employer has entered into a settlement agreement with an enforcement agency for backpay that is less than the amount initially proposed in an administrative merits determination, the compromise amount of relief should be accepted as a "make whole" remedy of the violation.

Finally, several employer representatives objected to the use of remediation as a mitigating factor when the employer has challenged the violation and the matter has not yet been fully adjudicated—that is, while the employer is seeking administrative or judicial review of an administrative merits determination. The EEAC asserted that a contractor "cannot enter into remediation as described by the proposal if it chooses to contest the agency's finding through administrative tribunals, in court, or elsewhere." The EEAC argued that the Guidance should "recognize that where a violation is being contested, a contractor may still demonstrate mitigating factors apply, although remediation may not be the most important factor in such cases."

After carefully considering all the comments, the Department modifies the discussion of remediation in the Guidance for clarity, but otherwise declines to make substantive changes. The Department does not believe that the Guidance was unclear about what constitutes a remedial measure. As the Guidance notes, remedial measures can include measures taken to correct an unlawful practice, make affected employees whole, or otherwise comply with a contractor's obligations under the Labor Laws. *See* Guidance, section III(B)(1)(a). The measures taken to correct an unlawful practice or make employees whole are necessarily specific to the Labor Law violation at issue. For example, where WHD finds that an employee was misclassified as an independent contractor and not paid a minimum wage or overtime under the FLSA, remedial measures could include correcting the practice by appropriately classifying the employee going forward (or appropriately classifying all similarly situated employees going forward) and making the employee whole by paying to the employee the back wages that the Labor Law decision specifies are owed to the employee.

The Department does not agree that the Guidance should limit consideration of preventative measures as "remediation" because those measures may go beyond the basic legal requirements under the Labor Laws. The commenters that suggested such a limit confuse both the purpose of the Order and the authority under which it was promulgated. The purpose of the Order is not to better enforce the Labor Laws generally, and the President did not promulgate the Order under the legal authority of the specific Labor Law statutes. Rather, the Order's purpose is to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by ensuring that they understand and comply with labor laws. *See* Order, section 1. And the Order was promulgated under the President's authority under the Procurement Act, not the Labor Laws. Accordingly, ALCAs and contracting officers are not barred from crediting contractors for implementing future-oriented measures that go beyond the minimum specifically required under the Labor Laws—whether voluntarily, through a settlement with an enforcement agency, or through a labor compliance agreement negotiated at the suggestion of an ALCA.[75]

The Guidance recognizes enterprise-wide efforts and enhanced settlement agreements as particularly important because they reflect a contractor's commitment to preventing future Labor Law violations and may include internal compliance mechanisms that will catch (and encourage the correction of) potential problems at an early stage. These kinds of preventative measures are exactly the type of policies and practices that increase efficiency in Federal contracting by limiting the likelihood that violations will occur during the subsequent performance of a Federal contract. The Department clarifies in the final Guidance that ALCAs thus may appropriately consider such efforts or measures as weighing in favor of a satisfactory record of Labor Law compliance.

The Department agrees with the EEAC that ALCAs should not second-guess the remediation that has already been negotiated by enforcement agencies. A contractor's prior settlement with an enforcement agency should generally be considered to be "make-whole" relief on behalf of affected workers. Such settlement agreements reflect the agency's decisions about the appropriate amount of backpay owed and the specific steps needed to correct the violations or otherwise make affected workers whole. Accordingly, ALCAs will not revisit whether an existing agreement with an enforcement agency adequately corrects a violation.

Nonetheless, the existence of a settlement agreement does not bar an ALCA from considering that a violation occurred in the first place. Nor does remediation carried out because of such a settlement agreement necessarily have great weight where there are other factors present—such as an extensive pattern of violations, other violations that were not within the jurisdiction of the agency negotiating the settlement, or the existence of new violations subsequent to the settlement. In such circumstances, if the settlement agreement does not include measures to prevent future violations, then a contracting officer (in consultation with an ALCA) may decide that a labor compliance agreement is warranted in order to consider the contractor to be responsible or may find the contractor nonresponsible. *See* Guidance, section III(C).

With regard to the commenters' concerns about engaging in remediation during ongoing litigation, the Department does not believe any change to the Guidance is necessary. It is not clear from the EEAC comment why a contractor could not remediate while continuing to contest a violation. Employers often choose to remediate during ongoing litigation for various reasons, including to limit backpay liability.

Finally, the Department rejects the commenters' implication that crediting remediation during ongoing litigation violates a contractor's right to due process. Employers who receive administrative findings of Labor Law violations have the right to due process, including various levels of adjudication and review before administrative and judicial tribunals, depending on the labor law involved in the violation. The purpose of the Order is not to circumvent that adjudicatory and appellate process. Rather, contracting officers have a duty to protect the procurement process by conducting responsibility determinations (and ALCAs have a duty to provide advice regarding Labor Law violations) to ensure that Federal contractors are responsible and that they will not engage in Labor Law violations that could undermine the quality and timeliness of Federal contract performance. Thus, the purpose of valuing remediation as a mitigating factor—even during ongoing litigation—is to give a contractor with a significant record of non-compliance an opportunity to take corrective action and make systemic changes in order to prevent violations during the performance of a future Federal contract.

Worker Participation in Safety-and-Health Programs

Several unions proposed that to qualify as a mitigating factor, safety-and-health programs should encourage active worker participation. One union commented that these programs must encourage the reporting of work hazards and injuries without penalty. Some commenters also supported the implementation of joint labor-management safety-and-health committees. One industry commenter recommended that the category of mitigating factors related to safety-and-health programs should "explicitly include participation in OSHA Voluntary Protection Programs" as well as include reference to ISO 45001, which is a voluntary consensus standard for occupational safety-and-health management systems currently under development. The commenter argued that both of these include elements similar to the standards already referenced in the Proposed Guidance, including employee involvement and continuous improvement.

As discussed above, the Department considers further specific guidance on the content of safety-and-health programs to be unnecessary. ALCAs will have the ability to take additional information about safety-and-health programs into consideration as part of their review of the totality of the circumstances. In particular, the Department agrees that OSHA's Voluntary Protection Programs and the ISO 45001 consensus standard are similar to the programs and standards cited in the proposed guidance on mitigating factors. As such, employers who participate in such programs or have adopted safety-and-health management systems pursuant to recognized consensus standards are encouraged to include this information when they have an opportunity to provide relevant information, including regarding mitigating factors.

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[75] The Department has modified the Guidance to include a separate and more extensive explanation of labor compliance agreements as a part of the subsequent section III(C), "Advice regarding a contractor's record of Labor Law compliance." Accordingly, the Department summarizes and responds to comments regarding labor compliance agreements below as a part of a parallel section in this section-by-section analysis. In that section, the Department responds to commenters' concern about whether it is appropriate for a labor compliance agreement to require preventative measures that may go beyond minimum compliance with the Labor Laws.

Other Compliance Programs

One commenter suggested that other types of compliance programs—not just safety-and-health programs or grievance procedures—should be considered as mitigating factors. The commenter recommended retitling this factor or adding a separate subsection specifically on compliance programs.

The Department agrees that other compliance programs should be included in this category, and notes that the Proposed Guidance already references "other compliance programs" in the mitigating factors discussion. To improve clarity, the Department adopts the commenter's recommendation to retitle this factor. This category is now entitled "Safety-and-health programs, grievance procedures, or other compliance programs."

Good Faith and Reasonable Grounds

One industry commenter, the Associated General Contractors of America (AGC), expressed concern that contractors' good-faith defenses "will not carry considerable weight in the responsibility determination." AGC argued that while ALCAs may have the legal understanding to make informed judgments about good faith disputes, the contracting officers who ultimately make a responsibility determination do not—and will instead defer to the agency determination or court judgment.

The Department believes that it is important to provide contractors with an opportunity to explain violations in cases where the contractor may have made efforts to ascertain and meet its legal obligations, but nonetheless have violated the law because of reliance on advice of a government official or an authoritative agency or court decision.

For example, several commenters proposed that the Guidance should account for situations where a violation is due to an agency error. With regard to the DBA and the SCA, for example, commenters noted that some violations are caused by the failure of the contracting agency to include the appropriate wage determination contract language. One commenter argued that contractors should not have to disclose these types of violations, while the other noted that the Proposed Guidance is unclear about how the Department will assess these types of violations. The Department agrees that it is important to account for violations that result from errors beyond the contractor's control. Where the contractor submits information showing that a violation occurred as the result of action or inaction by the contracting agency, such as the failure to include a required contract clause or wage determination, this information supports a conclusion that the contractor acted in good faith and had reasonable grounds for its conduct. While the Department believes that the language of the Proposed Guidance was broad enough to incorporate this concept, the final Guidance includes a clarification to this effect.

In addition, as discussed above in section III(A)(3)(e), some employer groups noted that employers must violate section 8(a) of the NLRA by refusing to bargain with a union in order to obtain appellate review of the NLRB's determination that a group of employees is an appropriate bargaining unit. While the Department does not view such violations as excusable or merely "technical," it does agree that the contractor's belief that it had justifiable reasons for committing a Labor Law violation should be taken into account as a possible mitigating factor during the weighing process.

The Department believes that the Order and the related new requirements and processes adequately address AGC's concerns about the capacity of contracting officers to weigh good-faith arguments. As discussed above, GAO reports have repeatedly stated that prior to the Order, contracting officers had the authority to consider labor violations during the responsibility determination process, but were reluctant to do so in part because of a lack of expertise on the matter. In response, the Order directed executive agencies to designate ALCAs and to coordinate with the Department so that contracting officers receive enough support. ALCAs will assist contracting officers with interpreting information about good faith and reasonable grounds as part of ALCAs' analysis and advice regarding contractor's record of Labor Law compliance.

Significant Period of Compliance

One employee-advocacy organization suggested that the Guidance should not include the "long period of compliance" factor. The organization commented that this factor may not provide an accurate assessment of the contractor's responsibility because a long period of "compliance" may be the result of infrequent inspections by Federal enforcement agencies during the 3-year disclosure period. It also commented that the duration of the "significant period of compliance" was not clearly defined.

Although the Department has declined to eliminate this factor, the Department has added language to address the concern that the duration of "significant period" was not defined. The Department has clarified that this factor is a stronger mitigating factor where the contractor has a recent Labor Law decision that it must disclose, but the underlying conduct took place significantly before the 3-year disclosure period and the contractor has had no subsequent violations.

Proposals To Expressly Include Additional Mitigating Factors

The Department also received comments that the Guidance should include additional mitigating factors.

Some labor organizations proposed that a contractor's participation in a collective bargaining agreement (CBA) should be considered a mitigating factor. This proposal is based on the view that workers covered by a CBA are likely to feel more secure reporting violations and working to get the violations resolved. In these circumstances, unionized employers may have a higher number of disclosed Labor Law decisions than non-union employers, particularly in the area of safety and health.

While the final Guidance does not explicitly list a CBA as a mitigating factor, the Department clarifies in response to this comment that the list of mitigating factors in the Guidance is non-exclusive. The FAR rule states that an ALCA's analysis and advice must include whether there are "any" mitigating factors. FAR 22.2004–2(b)(4)(iii). Thus, to the extent that a contractor believes that a CBA provision is relevant to the violation at issue, a contractor should submit this information for consideration as a mitigating factor.

Finally, one industry commenter stated that the FAR rule and Guidance sections on mitigating circumstances should place greater emphasis on a contractor's overall commitment to compliance to Labor Laws (as evidenced by its policies and practices), and require ALCAs and contracting officers to consider such information. The Department considers any such modification to be unnecessary. The Proposed Guidance already recognized the importance of a contractor's overall commitment to compliance by assessing various factors such as the number and severity of violations, the existence of safety-and-health programs, and arguments about good faith and reasonable grounds.

2. Factors That Weigh Against a Satisfactory Record of Labor Law Compliance

The Department received numerous comments about the Proposed Guidance's explanation of violations that "raise particular concerns" about contractor integrity and business ethics. The Proposed Guidance provided a non-exclusive list of certain types of violations that raise particular concern: Pervasive violations, violations that meet two or more of the serious, repeated, or willful classifications, violations that are reflected in final orders, and violations of particular gravity. Some commenters felt that these categories were too broad, while others proposed expanding them further.

Several employer organizations argued that the Proposed Guidance did not provide sufficient detail on how ALCAs and contracting officers are to assess the various factors. These commenters said that the categories of violations that "raise particular concern" were vague and too expansive, and as a result ALCAs and contracting officers would have unchecked discretion when making assessments.

The Department declines to modify the Guidance in this respect. The Department does not agree that the categories of violations discussed in this section of the Guidance are too broad or vague. The categories are specific and are based on concrete, factual information—for example, the total damages and penalties assessed—that will usually be readily apparent from the findings in the Labor Law decisions.

However, the Department has changed the name of this category from "violations of particular concern" to "factors that weigh against a satisfactory record of Labor Law compliance." This change is not substantive but helps make clear that ALCAs will not make a finding as to whether any individual violation is a "violation of particular concern." Rather, ALCAs will assess all facts and circumstances that weigh for and against a conclusion that a contractor has a satisfactory record of compliance in order to provide helpful analysis and advice to the contracting officer.

Pervasive Violations

The Proposed Guidance stated that pervasive violations should receive greater weight because they raise particular concern about a contractor's integrity and business ethics. Several industry representatives commented that the Guidance does not provide sufficient direction on how to weigh whether pervasive violations would trigger the requirement for a labor compliance agreement. One suggested that quantitative information based on DOL enforcement data should be used to make an empirical definition of pervasiveness, based on a comparison with other employers in the same industry and jurisdiction. Other employer representatives repeated their view that the pervasive category is overly broad and vaguely defined, giving contracting officers and ALCAs too much discretion in assessing the record of a contractor with pervasive violations or deciding whether a labor compliance agreement is warranted.

The Department declines to modify the guidance on weighing pervasive violations. As explained above and in the previous discussion of the definition of pervasive, flexibility and discretion are necessary when assessing the severity of pervasive violations, given the range of factors that must be considered. The Department does not believe it would be appropriate to set a finite threshold for the number or types of violations that indicate a lack of integrity and business ethics and therefore suggest that a labor compliance agreement may be warranted.

Violations That Meet Two or More of the Serious, Repeated, or Willful Classifications

The Proposed Guidance stated that violations that fall into at least two of the serious, repeated, or willful classifications are violations of particular concern. Some industry groups questioned this approach. For example, one employer organization argued that these classifications are defined so broadly that many violations will fall into two of them even though the violations themselves are not significant enough to bear on contractor integrity and business ethics. The Department retains this criterion as an example of a factor that weighs against a satisfactory record of Labor Law compliance; and the Department has added an additional clarification to section III(A) of the Guidance that a single violation may satisfy the criteria for more than one classification. As explained above, the Department disagrees that the serious, repeated, and willful classifications are defined too broadly.

Violations That Are Reflected in Final Orders

In the Proposed Guidance, the Department stated that violations reflected in final orders should receive greater weight. Several commenters supported this proposal. The Service Employees International Union (SEIU), however, argued that lodging an appeal should not prevent a determination from receiving greater weight if the contractor's "appeal is clearly non-meritorious or frivolous and was taken in order to delay compliance." SEIU further stated that, conversely, if an appeal of an adverse determination is "of a close or unsettled point of law, lesser weight should be given to the nonfinal violation(s)."

The Department declines to change the Guidance in this manner. ALCAs will not be able to evaluate the legal merit of or motivation behind a contractor's appeal, nor should they attempt to do so. However, the Department agrees with SEIU commenter that whether a violation involves a "close or unsettled point of law" may in certain circumstances be relevant in the assessment process. For example, as discussed above, the Guidance provides that a contractor's good-faith effort to meet its legal obligations may be a mitigating factor—and that this may occur where a new statute, rule, or standard is first implemented and the issue presented is novel.

SEIU's underlying concern is that providing extra weight to final decisions could incentivize contractors to contest a Labor Law decision that they might otherwise not have contested—simply in order to delay it from becoming final under after a contract has been awarded. The Department acknowledges that such an outcome would be problematic and could lead to unnecessary litigation and uncertainty, and perhaps a delay in the correction of a violation or relief to injured workers. However, the Department does not believe that this outcome will be the practical result of the Guidance.

As an initial matter, if a Labor Law decision is contested, subsequent decisions (*e.g.,* on an appeal) will themselves be Labor Law decisions that will need to be disclosed under the Order. *See* Guidance, section II(B)(4). However, an uncontested (and therefore final) decision will no longer be considered by an ALCA during review of the contractor's record, nor by the contracting officer during the responsibility determination, after 3 years. And, as the final Guidance notes, "[w]hile a violation that is not final should be given lesser weight, it will still be considered as relevant to a contractor's record of Labor Law compliance." *Id.* section III(B)(2)(e). This provides a counterweight to the perceived incentive to contest violations.

An even more significant counterweight is the value placed on mitigating factors, and, in particular, remediation as a mitigating factor. If a contractor has remediated the violation, that factor weighs in favor of a satisfactory record of compliance. Thus, while there may be an incentive for contractors to contest a violation, contractors have an equally powerful incentive to stop contesting a violation and remediate. As the Guidance notes, "[d]epending on the facts of the case, even where multiple factors [weighing against a satisfactory record] are present, they may be outweighed by mitigating circumstances." Guidance, section III(B)(2). Thus, a prospective contractor with Labor Law violations that is planning to bid on future contracts may be best served by considering how to remediate and resolve violations, not by contesting them.

The Department also received a comment from the Equal Employment Advisory Council (EEAC) that questioned the manner in which the Proposed Guidance treated final orders. The EEAC agreed that final orders generally should be given more weight, but argued that this is not appropriate when the final order only involves "minor or technical violations."

The Department declines to modify the Guidance in response to this comment. In general, the question of whether a violation is "minor" or "technical" is addressed by the classification of violation as serious, repeated, willful, and/or pervasive. If a violation is not classified as serious, repeated, willful, or pervasive, then it is not factored into the ultimate analysis and advice—whether or not it has been the subject of a final order. Moreover, even where a violation is classified as serious, repeated willful, or pervasive and has also been the subject of a final order, it will not necessarily result in a finding that the contractor has an unsatisfactory record of Labor Law compliance. As explained above, the assessment process requires consideration of the totality of circumstances, including any mitigating factors. Thus, while a final order may provide additional weight against a finding of a satisfactory record in a given case, the contractor's good-faith arguments and remediation of the violation may weigh even more heavily in the other direction. The Department believes that these processes for considering the totality of the circumstances are sufficient to take into account any argument that a particular violation or violations was "minor" or "technical."

Violations for Which Injunctive Relief is Granted

As explained above in section III(A)(1)(b) of this section-by-section analysis, the Department has determined that the granting of injunctive relief by a court is better considered as part of the weighing process than as a criterion for a serious violation. This means that the fact that injunctive relief has been granted is only relevant during an ALCA's assessment process if the violation at issue is already classified as serious, repeated, willful, and/or pervasive. If the violation is so classified, then the fact that injunctive relief was granted as part of the remedy for the violation is a factor that will weigh against a satisfactory record of Labor Law compliance.

As discussed above, taking injunctive relief into consideration in this manner is responsive to concerns that it would be overinclusive as a criterion for a serious violation—and it still appropriately values the fact that courts rarely grant either preliminary or permanent injunctions and require a showing of compelling circumstances, including irreparable harm to workers and a threat to the public interest. Accordingly, where a court grants injunctive relief to remedy a violation that is already classified as serious, repeated, willful, and/or pervasive, the ALCA should take this into account as a factor that increases the significance of that violation to the contractor's overall record of Labor Law compliance.

Violations of Particular Gravity

The purpose of the "particular gravity" factor is to identify examples of violations that generally have more severe adverse effects on workers and more potential to disrupt contractor performance, and thus should receive greater weight in determining whether a labor compliance agreement is needed or other action is necessary. In the Proposed Guidance, the Department listed four examples of violations of particular gravity: "violations related to the death of an employee; violations involving a termination of employment for exercising a right protected under the Labor Laws; violations that detrimentally impact the working conditions of all or nearly all of the workforce at a worksite; and violations where the amount of back wages, penalties, and other damages awarded is greater than $100,000." 80 FR 30,574, 30,590.

Several industry commenters criticized this category. In a representative comment, the EEAC articulated several of these concerns:

> [T]he Department's category of violations of "particular gravity" is also too broad. Equating every type of retaliation claim with violations resulting in the death of an employee strains credibility. Further, including in this category any violation where the amount of back wages, penalties, and other damages is greater than $100,000 would include an overrepresentative proportion of routine administrative merits determinations found by the EEOC . . . . Finally, the category of violations that "detrimentally impact the working conditions of all or nearly all the workforce at a worksite" is unclear as the guidance provides no direction as to what conduct will constitute "detrimental impact" of working conditions.

Other employer groups echoed these concerns.

While unions and worker-advocacy groups generally supported the definition of "violations of particular gravity," several suggested that the Department should modify one of the examples in its list of violations of particular gravity. These commenters proposed broadening the retaliatory termination example to include interference with any protected right and clarifying that it includes retaliatory constructive-discharge situations.

The Department has considered the concerns raised by industry comments and declines to make any substantive changes to the category of violations of particular gravity.

First, the Department does not agree that this factor is too broad because it includes both violations that involve the death of an employee and violations involving retaliatory termination of an employee. While the Department agrees that the death of a worker is a tragedy that cannot be easily compared to other violations, it would be unreasonable to suggest that other violations are not of a particular gravity simply because there has been no loss of life. Moreover, the EEAC's comment misstates the treatment of retaliation in the proposed guidance. Retaliation can involve many types of adverse action. The guidance specifies only that violations "involving a termination of employment for exercising a right protected under the Labor Laws" receive greater weight. By this language, the Department did not intend to suggest (as the EEAC stated) that "every type of retaliation claim" is considered per se to be of particular gravity.

Second, the Department believes that the Guidance's $100,000 threshold is appropriate, as the amount of damages in a case provides a practical measure of the extent losses experienced by employees. The Department does not agree with the argument that such a threshold is inappropriate because it would include an "overrepresentative" proportion of EEOC determinations. The Department believes that it is misguided to focus on the proportion of decisions that would meet a monetary test of gravity. Rather, it is appropriate to give additional weight to those violations that have a severe harmful effect on workers. In terms of the economic impact on the workforce, $100,000 in lost wages due to discrimination is just as severe as $100,000 in lost wages due to a wage-and-hour violation.

Third, the Department considers it appropriate to give greater weight to those violations that "detrimentally impact the working conditions of all or nearly all the workforce at a worksite." 80 FR 30574, 30590. When unlawful conduct causes negative impact that is widespread in scope, additional weight is warranted.

Finally, in response to employee groups' concerns, the Department believes that it is unnecessary to state explicitly that a retaliation violation involving a constructive discharge should be considered the same as a retaliation violation involving a termination. Enforcement agencies are responsible for finding violations. The enforcement agencies and adjudicatory tribunals—not ALCAs—decide whether a constructive discharge amounts to an unlawful termination. The Department also finds it unnecessary to characterize all violations involving an interference with protected rights as violations of particular gravity. The list of violations of particular gravity is not an exclusive list, and the Department does not intend to limit an ALCA's ability to describe a violation as one of particular gravity where the facts of the case merit such a description.

C. Advice Regarding a Contractor's Record of Labor Law Compliance (Step Three)

In the final Guidance, the Department creates a new subheading for the discussion of an ALCA's advice to contracting officers and the relationship of labor compliance agreements to that process. The core parameters of this process are defined in the FAR rule. The Department has modified the description of the advice process in the Guidance to conform to the structure in the rule. The Department received many comments about this process. Because these comments and the reasons for changes to the proposed FAR rule are discussed in the preamble to the final FAR rule, they are not included here.

While the FAR rule governs the advice process, the Department and its individual enforcement agencies play an important role in negotiating labor compliance agreements and assisting ALCAs with their duties. The Order instructs contracting officers to consult with ALCAs about Labor Law violations and labor compliance agreements during the preaward responsibility determination and also during the postaward period when considering whether to take actions such as the exercise of an option on a contract. Order, section 2(a)(iii), (b)(ii). The Order directs ALCAs to provide this advice in consultation with the Department or other relevant enforcement agencies. *Id.* section 3(d)(ii). As a result, the Department has expanded its discussion of labor compliance agreements in the final Guidance and addresses relevant comments below.

Summary of the "Advice and Analysis" Component of the Final FAR Rule

The final FAR rule discusses the written advice and analysis that an ALCA provides to the contracting officer for use in the responsibility determination. FAR 22.2004–2(b)(3). The rule provides that ALCAs may make one of several recommendations, including that a labor compliance agreement is necessary, the appropriate timing for negotiations of an agreement, and whether notification of the agency suspending and debarring official is appropriate. *Id.* Contracting officers consider advice provided by ALCAs along with advice provided by other subject matter experts.

The ALCA's advice and analysis must also include the number of Labor Law violations; their classification as serious, repeated, willful, and/or pervasive; any mitigating factors or remedial measures; and any additional information that the ALCA finds to be relevant. FAR 22.2004–2(b)(4). If the ALCA concludes that a labor compliance agreement or other appropriate action is warranted, then the written analysis must include a supporting rationale. *See id.*

Timeframe for ALCA Advice and Analysis

The FAR Council's proposed rule set out a 3-day period for ALCAs to provide contracting officers with recommendations about the contractor's record of Labor Law compliance. The Department received many comments expressing concern that this timeframe is infeasible and will lead to unfair responsibility determinations. Commenters representing both employers and employees commented that in some cases ALCAs will have to review a large amount of information to make their recommendations. One union, in a representative comment, argued that while 3 days may be enough in many cases, this timeframe would be too short when an ALCA's recommendation involves weighing existing labor compliance agreements; high severity violations; or multiple willful, pervasive, or repeated violations.

The proposed rule suggested that contracting officers would be permitted to make a responsibility determination without input from an ALCA if the ALCA failed to make a recommendation within the 3-day period. Some employer organizations speculated that the contracting officer might delay the contract award while waiting for the ALCA recommendation, regardless of the authority to act independently; or, if he or she does act independently, the contracting officer might make a determination inconsistent with other contracting officers, contracting agencies, or ALCAs.

These comments are addressed in the preamble to the final FAR rule and therefore are not addressed here. In brief, the final FAR rule retains the default 3-day period for an ALCA to provide advice. *See* FAR 22.2004–2(b)(2)(i). It also retains the possibility for the contracting officer to provide the ALCA with "another time period" for submitting the advice. See *id.* And it retains the requirement that if the contracting officer has not received timely advice, the contracting officer must proceed with the responsibility determination using available information and business judgment. See *id.* 22.2004–2(b)(5)(iii).

De Facto Debarment

Members of Congress and industry advocates also expressed concern that the short timeframe for ALCA advice may lead to "de facto" debarment of contractors that have been subject to a prior nonresponsibility determination. "De facto debarment occurs when a contractor has, for all practical purposes, been suspended or blacklisted from working with a government agency without due process, namely, adequate notice and a meaningful hearing." *Phillips* v. *Mabus,* 894 F.Supp.2d 71, 81 (D.D.C.2012). These commenters suggested that contracting officers might try to save time and effort by improperly following earlier determinations without conducting their own assessments. This, the commenters suggested, would result in effectively "blacklisting" certain companies from Federal contracting.

De facto debarment may occur where a contracting agency effectively avoids the due process requirements of a debarment hearing by instead repeatedly finding a contractor nonresponsible and denying individual contracts based on one initial nonresponsibility determination. *See generally Old Dominion Dairy Prods., Inc.* v. *Sec'y of Def.*, 631 F.2d 953 (D.C. Cir. 1980). A single nonresponsibility determination is insufficient to establish a de facto debarment. *Redondo-Borges* v. *U.S. Dep't of Hous. & Urban Dev.*, 421 F.3d 1, 9 (1st Cir. 2005). However, because an initial nonresponsibility determination based on a lack of integrity or business ethics must be recorded in the Federal Awardee Performance and Integrity Information System (FAPIIS), *see* FAR 9.105–2(b), and contracting officers must review FAPIIS during each subsequent responsibility determination, *id.* 9.104–6(b), a risk of de facto debarment is inherent in the existing Federal procurement system—and contracting agencies, OMB, and the Office of Federal Procurement Policy must continually guard against it.

The Department disagrees with the commenters that the Order and the related structure of the FAR rule present an unreasonable risk of de facto debarment. The Department agrees that it would be inappropriate for an ALCA to base his or her advice and analysis solely on a prior analysis of a contractor's Labor Law compliance record. However, the FAR requires contracting officers—with the assistance of ALCAs—to make independent decisions in every case based on the information provided by contractors during the respective solicitation process. *See generally* FAR 22.2004–2.

Circumstances Warranting Negotiation of a Labor Compliance Agreement

The Department received several comments that the proposed rule and Proposed Guidance did not clearly specify when an ALCA and a contracting officer will require a contractor to negotiate a labor compliance agreement. One employer organization argued that determining whether an agreement is necessary or sufficient calls for subjective decisions by ALCAs. The organization also expressed concern that labor unions might use labor compliance agreements to pressure employers while negotiating neutrality or collective bargaining agreements.

Numerous worker-advocacy organizations commented that a labor compliance agreement should be required as a condition of receiving a contract, especially if the employer has "violations of particular concern," as they are described in the Proposed Guidance. Several commenters proposed that a labor compliance agreement should always be required when a contractor violates the Labor Laws during the performance of a Federal contract, unless the ALCA determines that the violation is minor, old, or unlikely to recur after a long period of time.

The Department has carefully considered these comments and has included additional language discussing when it is appropriate for an ALCA to recommend that a labor compliance agreement is warranted. *See* Guidance, section III(C)(1). A labor compliance agreement may be warranted where the ALCA has concluded that a contractor has an unsatisfactory record of Labor Law compliance. *Id.* section III(C)(1). This may be the case where the contractor has serious, repeated, willful, and/or pervasive Labor Law violations that are not outweighed by mitigating factors—but the ALCA identifies a pattern of conduct or policies that could be addressed through preventative actions. Where this is the case, the contractor's record of Labor Law violations demonstrates a risk to the contracting agency of repeated violations during contract performance, but these risks may be mitigated through the implementation of appropriate enhanced compliance measures. A labor compliance agreement also may be warranted where the contractor presently has a satisfactory record of Labor Law compliance, but there are also clear risk factors present, and a labor compliance agreement would reduce these risk factors and demonstrate steps to maintain Labor Law compliance during contract performance.

A labor compliance agreement is not needed where a contractor has no Labor Law violations within the 3-year disclosure period or has no violations that meet the definitions of serious, repeated, willful, or pervasive. A labor compliance agreement may also not be needed where the contractor does have violations that meet the definitions of serious, repeated, willful, or pervasive, but under the totality of the circumstances the existence of the violations is outweighed by mitigating factors or other relevant information.

Finally, there are circumstances in which a contractor may have an unsatisfactory record of Labor Law compliance, but a labor compliance agreement is not warranted—and instead the agency suspending and debarring official should be notified. This is the case where the contractor has serious, repeated, willful, and/or pervasive Labor Law violations that are not outweighed by mitigating factors—and, in addition, there are indications that a labor compliance agreement would not be successful in reducing the risk of future noncompliance. The final Guidance contains examples that illustrate when this may be the case.

However, the Department disagrees with the commenters—both industry and worker-advocacy groups—that argued that the final Guidance should further limit the discretion of contracting officers and ALCAs. Contracting officers and ALCAs must have the ability to review all relevant facts concerning Labor Law violations and mitigating factors, and to make determinations as to when agreements are appropriate. As discussed above, ALCAs and contracting officers are provided with robust parameters for making this underlying determination—from the FAR and the Guidance, and also through consultation with the enforcement agencies.

Moreover, the Department specifically declines to adopt the employee advocate suggestion that a labor compliance agreement is always warranted where a contractor has a "violation of particular concern." As discussed above in section III(B) (Weighing Labor Law violations and mitigating factors) of this section-by-section analysis, the Department has clarified that it did not intend for ALCAs to make specific findings that violations are "violations of particular concern." Rather, the analysis requires a weighing process, where certain factors will weigh in favor of an overall conclusion that a contractor has a satisfactory record of Labor Law compliance, and others will weigh against. Thus, it is not appropriate to tie advice about the need for a labor compliance agreement to existence of any one of these factors.

Negotiation of a Labor Compliance Agreement

The Department notes that some commenters may have incorrectly understood that ALCAs or contracting officers would negotiate labor compliance agreements directly with contractors. The final FAR rule and the final Guidance clarify that it is enforcement agencies—not ALCAs or contracting officers—who negotiate labor compliance agreements. The Guidance provides additional detail on the roles and duties of each of these actors—ALCAs, contracting officers, and enforcement agencies—with regard to determining the need for and negotiation of labor compliance agreements.

The ALCA conducts a holistic review of the circumstances surrounding the contractor's Labor Law violations, including any mitigating factors. Guidance, sections III(A) (classification step), III(B) (weighing step). If the ALCA concludes that a contractor has an unsatisfactory record of Labor Law compliance, the ALCA will consider whether the negotiation of a labor compliance agreement may be warranted. After that, the ALCA produces a written advice and analysis for the contracting officer. *Id.* section III(C) (advice and analysis step).

If the ALCA assessment indicates a labor compliance agreement is warranted, the contracting officer provides written notice to the contractor. FAR 22.2004–2(b)(7). The notice includes the name of the enforcement agency with which the contractor should confer regarding the negotiation of the agreement. *Id.* The contractor and the enforcement agency may then initiate negotiations. Any resulting labor compliance agreement will be an agreement between that enforcement agency and the contractor.

Labor Compliance Agreements as a Mitigating Factor

In its discussion of remediation as a mitigating factor, the Proposed Guidance stated that enhanced settlement agreements and labor compliance agreements between a contractor and an enforcement agency represent important ways to mitigate the weight of a Labor Law violation. The Proposed Guidance noted that entering into a labor compliance agreement indicates that the contractor recognizes the importance that the Federal Government places on compliance with the Labor Laws.

Industry commenters criticized how the Proposed Guidance addressed the relationship between mitigating factors and labor compliance agreements. Several stated that requiring such agreements raised due process and fairness concerns. They asserted that a contractor may feel pressured to negotiate or sign a labor compliance agreement and forgo a challenge to a nonfinal administrative merits determination in order to receive a pending contract. Several employer organizations argued that labor compliance agreements would unfairly penalize contractors by subjecting them to multiple rounds of remedial requirements in response to the same underlying conduct.

The Department declines to change the Guidance in response to the criticisms discussed above. The Department notes that considering labor compliance agreements in the mitigating factor analysis is consistent with the Order and the FAR rule. *See* Order, section 2(a)(ii); FAR 22.2004–2(b)(3)–(4). Labor compliance agreements may contain remedial measures (such as the payment of back wages) or enhanced compliance measures (such as the implementation of new safety-and-health programs). When implemented outside of the context of a labor compliance agreement, these types of measures are individually mitigating factors. It is therefore reasonable to consider a labor compliance agreement containing such measures also to be a mitigating factor.

The Department disagrees that labor compliance agreements raise due process concerns. As the Department has clarified in the final Guidance, in appropriate circumstances contractors may enter into labor compliance agreements while at the same time continuing to contest an underlying Labor Law violation. And, if a contractor and a contracting officer disagree about whether a labor compliance agreement is necessary and the contractor refuses to negotiate an agreement, the existing procurement process provides ample opportunity to contest any resulting nonresponsibility determination. The contractor can bring a bid protest and receive a hearing and judicial review of the agency action.

The Department also disagrees with the argument that labor compliance agreements will unfairly penalize contractors. The purpose of a labor compliance agreement is not to penalize a contractor for past violations; it is to protect the Federal Government's interest in economy and efficiency in the prospective contract at issue. As discussed above, Federal agencies have a duty to contract only with responsible sources, and a track record of Labor Law violations raises serious questions about whether a contractor can be trusted to comply with Labor Laws—or with other non-labor laws—during the course of contract performance. Labor compliance agreements provide contractors that are otherwise at risk of being found nonresponsible with an additional opportunity to take the steps necessary to assure contracting officers that their past noncompliance will not be repeated during contract performance. Thus, they are properly understood as an opportunity for contractors, not a penalty.

Duration of a Labor Compliance Agreement

One employer organization commented that contractors needed more information about the procedural aspects of labor compliance agreements. One question this commenter raised is how long labor compliance agreements will last.

The Department declines to specify a set duration for labor compliance agreements. In general, the duration of an agreement will be the subject of negotiations between the contractor and the enforcement agency—and the enforcement agency will take a position regarding the appropriate length of agreement based on the facts and circumstances of the case and that agency's current practices in negotiating enhanced compliance agreements. However, the extent to which a labor compliance agreement extends beyond the expected duration of the contract will not be taken into consideration in determining a contractor's responsibility or in other decisions related to the contract at issue.

Elements of a Labor Compliance Agreement

Several unions and worker groups proposed that the Guidance should require that all labor compliance agreements contain a prescribed list of elements. Suggestions included (1) remedies for any labor law violation; (2) notice and training for workers about the labor compliance agreement and instructions for reporting violations; (3) a plan to prevent future violations; (4) an agreement that the contractor will self-report any alleged violations of the agreement; and (5) enforceable safeguards to prevent employer retaliation against employees who lodge complaints.

The Department does not agree that it should prescribe the content of labor compliance agreements. The enforcement agencies, which will negotiate labor compliance agreements, will determine the terms of each labor compliance agreement on a case-by-case basis, taking into consideration the totality of the circumstances.

Remedial Measures To Be Included in Labor Compliance Agreements

Labor union and worker-advocacy commenters emphasized that labor compliance agreements should require employers to take remedial actions that would prevent future violations. In contrast, numerous employer representatives commented that labor compliance agreements should not impose "enhanced compliance" measures—or remedial measures that go beyond basic compliance with the requirements of the labor law that has been violated. For example, one employer organization raised a question about whether an agreement would apply only to the business unit or location with the alleged violation—or would apply company-wide. Other commenters raised similar concerns that labor compliance agreements might impose remedial measures that are broader than remedies that could be imposed by courts or enforcement agencies under the Federal labor laws.

Another employer organization expressed a related point about what remedial actions can be expected in labor compliance agreements:

> While we agree that any contractor practices that go above and beyond the requirements of the law may constitute evidence of remediation or otherwise serve as a mitigating factor, these provisions should not be read so as to require remediation efforts that exceed the law's requirement simply to get "full credit" for remediation.

The Department agrees with the commenters that assert that labor compliance agreements are not limited to providing compensation for individual employees, abating a hazard, or changing an unlawful policy. Rather, agreements may (and often should) contain additional provisions that are directed at ensuring future compliance with the law. The Order expressly requires that the contracting officer, when making a responsibility determination, must give a contractor with a violation the opportunity to disclose "any agreements entered into with an enforcement agency." Order, section 2(a)(ii). The ALCA then must advise the contracting officer about the need for an agreement to implement remedial measures or steps to "avoid further violations." *Id.*

The requirement that contractors take actions to avoid future violations is not new in the Federal contracting process. Because contracting with the Federal Government is a privilege and not a right, contracting agencies can generally require that contractors meet specific conditions in order to receive a contract award. Accordingly, Federal contractors already have a duty to implement programs intended to prevent some labor law violations. For example, FAR 36.513 Accident Prevention requires a contractor to submit a written safety-and-health plan for identifying and controlling hazards where work is of a hazardous nature. Similarly, under current practice, suspending and debarring officials routinely negotiate "administrative agreements" that contain exactly the sort of enhanced compliance measures about which the industry commenters raised concerns.[76] By entering into a labor compliance agreement, a contractor agrees to take specific actions designed to achieve and maintain compliance during the contract period; this is not any different than administrative agreements.

In addition, as commenters' references to "enhanced compliance agreements" indicate, the negotiation of preventative measures as part of a settlement is also a traditional aspect of both criminal and civil law enforcement—of the Labor Laws and otherwise. Enforcement agencies such as OSHA, WHD, and OFCCP currently negotiate enhanced compliance agreements, including enterprise-wide agreements, as part of the settlement of enforcement actions under their respective Labor Laws. In sum, the inclusion of preventative measures in labor compliance agreements—which are negotiated with these enforcement agencies—is a reasonable and well-established mechanism for enforcing the existing law and protecting the integrity of the Federal contracting process.

Relationship of Labor Compliance Agreement Terms to the Procurement Contract

Several unions and worker-advocacy organizations proposed that the terms of a labor compliance agreement should be incorporated into the procurement contract. One commenter stated that the terms of labor compliance agreements should operate as mandatory contract clauses that are enforceable, whether or not expressly included in the contract language. Many worker-advocacy organizations argued that labor compliance agreements should provide for specific penalties, including contract termination, if the contractor fails to implement agreed-upon remedial measures during the contract period. Employer groups also suggested that the Guidance delineate the consequences of violating a labor compliance agreement.

The Department notes that final FAR rule does include reference to consequences for the breach of a labor compliance agreement. Breach of labor compliance agreement during the performance of a contract may justify the exercise of contract remedies, such electing not to exercise an option, terminating the contract, or notifying the agency suspending and debarring official. *See* FAR 22.2004–3(b)(3)(v)(C), (b)(4)(i)(B)(*2*)–(*4*). Additionally, where a prospective contractor has previously breached a labor compliance agreement, this may justify and ALCA's recommendation that the contracting officer could find that the contractor has an unsatisfactory record of integrity and business ethics and that the suspending and debarring official should be notified. *See id.* 22.2004–3(b)(3)(v); *see also* Guidance, section III(C)(1)(e).

Timing of Negotiation

Certain unions and employee advocacy organizations argued that if the contracting officer determines that a labor compliance agreement is necessary in order to establish that an employer can be considered a responsible contractor, then the agreement must be fully negotiated prior to the award of the contract. These commenters proposed that merely engaging in good-faith negotiations should not be considered sufficient to overcome a record of Labor Law violations. Rather, they suggested that a finalized enforceable remedial agreement should be required in order to permit a finding of contractor responsibility. SEIU proposed in the alternative that a labor compliance agreement should be executed within 2 months of the contract award and if the contractor fails to comply, "payments due the contractor under the contract should be withheld until [a labor compliance agreement] is executed."

The Department believes these comments address issues outside the scope of the Guidance and directs commenters to the preamble to the final FAR rule. However, the Department notes that, as discussed above, the final FAR rule provides that a contracting officer may require the contractor to commit, prior to award, to negotiate a labor compliance agreement "in good faith within a reasonable period of time." FAR 22.2004–2(b)(7)(ii). The contracting officer may also require that the contractor negotiate and execute an agreement prior to award. *See id.* 22.2004–2(b)(7)(iii). The ALCA is also required, during the performance of a contract, to report to the contracting officer whether the contractor is continuing to negotiate a labor compliance agreement or whether the contractor is adhering to an agreement that has been established. *Id.* 22.2004–3(b)(3)(i). The contracting officer then uses this information to determine whether to, among other actions, elect to exercise an option on the contract. *Id.* 22.2004–3(b)(4)(i).

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[76] *See* Office of Management and Budget, M–06–26, "Suspension and Debarment, Administrative Agreements, and Compelling Reason Determinations" (2006), *available at https://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2006/m06-26.pdf* ("Agencies sometimes enter into administrative agreements . . . as an alternative to suspension or debarment."); Interagency Suspension & Debarment Comm., "Report by the Interagency Suspension And Debarment Committee on Federal Agency Suspension and Debarment Activities for FY 2012 and FY 2013," 10 (2014) ("[T]he use of administrative agreements increase the Government's access to responsible sources and, thereby, promotes competition in the Federal marketplace."); *see also* Jennifer S. Zucker and Joseph Fratarcangeli, "Administrative Compliance Agreements: An Effective Tool in the Suspension and Debarment Process," The Army Lawyer (Feb. 2005), at 19–24 (describing the content of administrative agreements negotiated between the Army and contractors).

Relationship Between Labor Compliance Agreements and Settlement Agreements for Violations Under Litigation

Several industry commenters raised concerns about the relationship between labor compliance agreements and litigation-specific settlements for violations. One commenter stated that labor compliance agreements could overlap with and contradict provisions of settlement agreements that are already in place or administrative agreements reached as part of suspension and debarment proceedings.

One industry group argued that the negotiation process for labor compliance agreements could conflict with the Title VII conciliation process, citing a recent Supreme Court decision, *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645 (2015). *Mach Mining* addressed a statutory provision that requires EEOC to conciliate with employers following a reasonable cause determination. This commenter argued that the Order would remove the determination of good faith negotiation from Federal courts and place it in the hands of ALCAs or contracting officers.

The Department believes that concerns about labor compliance agreements conflicting with existing settlements are unwarranted. Contractors are encouraged to disclose information about existing settlements as a potential mitigating factor in the weighing process. In determining whether a labor compliance agreement is necessary, the ALCA will consider any preexisting settlement agreement—and recommend a labor compliance agreement only where the existing settlement does not include measures to prevent future violations.

In addition, the Department notes that a labor compliance agreement is an agreement between a contractor and an enforcement agency. Enforcement agencies will know if they previously entered into agreements with the contractor and can assure that any labor compliance agreement does not conflict with prior agreements.

Finally, the Department disagrees with the commenter's interpretation of *Mach Mining*. *Mach Mining* does not apply here because a labor compliance agreement is not a conciliation agreement, nor does it replace the EEOC's efforts to conciliate. Negotiation of a labor compliance agreement is separate and distinct from the conciliation process under Title VII.

Public Access to Labor Compliance Agreements, Recommendations, and Responsibility Determinations

Union commenters proposed that the Guidance specify that ALCA advice and analysis must be included in a public database, and that contracting officers' responsibility determinations, along with the reasons on which they are based, also must be made accessible to the public. Several also proposed that a contracting officer should be required to justify in writing if he or she makes a decision not to adopt an ALCA's recommendation that a labor compliance agreement be negotiated, and that this explanation should be made available to the public.

Several of these commenters also proposed that labor compliance agreements, as well as the contracting officers' responsibility determinations and ALCA recommendations, should be public documents. They stated that labor compliance agreements should be public so that employees and other commenters can monitor whether contractors meet their obligations under the terms of the agreements.

The Department declines to adopt the public-disclosure proposal. Mechanisms for public access to information on government contracts already exist, including the Freedom of Information Act (FOIA), USAspending.gov, and the Federal Awardee Performance and Integrity Information System (FAPIIS)—a government database that tracks contractor misconduct and performance. FAPIIS will indicate where a contractor has entered into a labor compliance agreement. In addition, the enforcement agencies that negotiate labor compliance agreements have the discretion to make the agreements themselves publicly available.

However, the Department notes that the final FAR rule does require the contracting officer to document in the contract file how he or she has taken into account an ALCA's recommendation and analysis—including whether a labor compliance agreements is warranted—in making the responsibility determination for the award. *See* FAR 22.2004–2(b)(5)(ii). In addition, the final FAR rule also states that where a contractor enters into a labor compliance agreement, the entry will be noted in FAPIIS by the ALCA and the fact that a labor compliance agreement has been agreed to will be public information. *Id.* 22.2004–2(b)(9). The Department has added reference to this procedure in section II(C)(3) of the Guidance.

Other Criticism of Labor Compliance Agreements

One employer advocate, in a representative comment, stated that the use of labor compliance agreements forces contractors to defend themselves in multiple forums on the same issues. Other employer organizations commented that the use of labor compliance agreements would deter businesses from seeking Federal contracts because they will add another layer of negotiation and uncertainty.

The Department has carefully considered these comments but does not modify the Guidance in response. Labor compliance agreements will enable contractors with a significant record of Labor Law violations, who might not otherwise be considered responsible, to obtain government contracts. Thus, as discussed above, labor compliance agreements are properly viewed as expanding opportunity and not imposing additional burdens. With regard to the question of competition, the commenters have not provided any objective evidence to support their statement that the use of labor compliance agreements would deter, rather than encourage, participation in Federal contracting. And, the Department also received comments from employee representatives stating that the Order's requirement that remedial measures be put in place through labor compliance agreements will enhance fair competition. These commenters argued that law-abiding contractors are currently deterred from seeking government business because they believe they will be underbid by unscrupulous contractors. The Department believes that the final FAR rule's inclusion of a structure for labor compliance agreements can only benefit competition by allowing contractors that might otherwise be barred from contracting—either through an individual nonresponsibility determination, suspension, or debarment—a path to responsibility instead.

IV. Postaward Disclosure and Assessment of Labor Law Violations

The Order requires contractors that made initial preaward disclosures of Labor Law violation information to update that information semiannually during performance of the covered procurement contract. Order, section 2(b). Where new Labor Law violation information is disclosed or otherwise brought to the attention of the contracting officer, the Order requires the contracting officer to consider whether action is necessary—including agreements requiring appropriate remedial measures or remedies such as decisions not to exercise an option on a contract, contract termination, or referral to the agency suspending and debarring official. *Id.* section 2(b)(ii). The Proposed Guidance referenced these provisions of the Order, and explained that postaward disclosures should include both (a) any new Labor Law decisions rendered since the last disclosure and (b) updates to previously disclosed information. 80 FR 30574, 30581.

Disclosure Update Requirements

The Department received a number of comments discussing the Order's postaward disclosure requirements. In general, employee-advocacy organizations approved of the requirements and urged the Department to strengthen them—particularly with regard to the consequences of violating a labor compliance agreement. In contrast, several industry commenters expressed concern that the semiannual, postaward disclosure requirement is unduly burdensome. These commenters suggested elimination of the requirement entirely.

The Department does not amend the Guidance to eliminate the postaward disclosure requirement. The final FAR rule has implemented this requirement in section 22.2004–3 of the FAR, and created a contract clause that incorporates these requirements into covered contracts, *see id.* 55.222–59(b). The Department agrees that this requirement is appropriate, because the Order expressly mandates postaward disclosures. *See* Order, section 2(b).

The Department also received multiple comments from industry groups requesting clarification about the timing of postaward disclosure and whether each contract would have its own disclosure cycle based on the date of each award. Some of these commenters asserted that companies with multiple Federal contracts would have an onerous reporting burden because the Order and the proposals will require such companies to constantly make disclosures. They proposed alternative ways to schedule their disclosure requirements; in particular, they suggested that the Department establish a unified, fixed-date disclosure schedule as opposed to reporting on the anniversary of each contract award.

The Department notes that the timing of postaward disclosures is a question that is resolved in the FAR rule. In response to similar comments, the final FAR rule provides the flexibility requested by commenters, allowing the contractor to use any date that it chooses before the six-month anniversary date of the award. FAR 22.2004–3(a)(2). The Department has included this clarified language in the Guidance.

Postaward Assessment of Labor Law Violations

Some industry commenters expressed concern that it would be disruptive to find a contractor nonresponsible in the middle of the performance of a contract based on a violation that is disclosed postaward. Similarly, other industry commenters were critical of using postaward violations as a basis for terminating a contract that was otherwise being properly and timely performed. These commenters argued that such information should only be used in connection with a contracting officer's consideration of whether to exercise an option to extend the contract.

The consideration of appropriate postaward actions is within the jurisdiction of the FAR Council, and the Department has deferred to the treatment of these issues in the final FAR rule. Under the final rule, the ALCA will follow a similar assessment process for postaward disclosures as for preaward disclosures. *See* FAR 22.2004–3(b)(3). The ALCA assesses the information disclosed and provides analysis and advice to the contracting officer regarding, among other questions, whether violations should be considered serious, repeated, willful, and/or pervasive, *see id.* 22.2004–3(b)(3)(i); and whether the contractor is adequately adhering to any labor compliance agreements, *see id.* 22.2004–3(b)(3)(v)(C). The contracting officer may then take no action and continue the contract, or may exercise one or more contract remedies under existing FAR regulations and procedures. FAR 22.2004–3(b)(4).

The Department believes that the FAR Council's rule appropriately implements the plain language of the Order requiring postaward consideration of the specified contract remedies. The Order expressly includes various appropriate remedies, including contract termination. Order, section 2(b)(ii). The Department notes that the Order and the final rule do not deviate in any significant way from what the FAR otherwise requires when a contracting officer receives information during contract performance that implicates a contractor's responsibility.

V. Subcontractor Responsibility

The Department has re-organized the discussions of subcontractor responsibility that appeared in several locations of the Proposed Guidance into a new section V of the final Guidance. The Department received several comments about the extent of subcontracts covered by the Order, the method of subcontractor disclosure, and the assessment by prime contractors of their subcontractors' responsibility. These comments are discussed in turn below.

Covered Subcontracts

The Proposed Guidance described "covered subcontracts" as including subcontracts for commercial items, but, as prescribed by the Order, excluding those for commercially available off-the-shelf (COTS) items. As discussed above in section II(A) of this section-by-section analysis, one industry commenter suggested that all commercial item contracts—and especially commercial item subcontracts—should be excluded from the Order's disclosure requirements. The commenter asserted that there is no basis for distinguishing between contracts for COTS items and contracts for commercial items.[77] In the alternative, the commenter suggested that coverage of commercial item subcontracts be delayed 5 years.

The Department declines to adopt the commenter's suggestions. As noted above, contract coverage is within the jurisdiction of the FAR Council, and the final FAR rule maintains the inclusion of "commercial item" subcontracts as proposed. *See* FAR 52.244–6. The final FAR rule also did not adopt the commenter's alternative request that coverage of commercial item subcontracts be delayed 5 years. However, in recognition of the additional complexity of the prime contractors' determination of subcontractor responsibility, the FAR Council has delayed implementation of all of the subcontractor disclosure and assessment requirements in the Order for an additional year beyond the effective date of the final rule. *See* FAR 22.2007(b).

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[77] Another commenter, Ogletree Deakins, asked a specific question about the definition of COTS items. The law firm stated that a construction company client "is of the opinion that its construction materials qualify as COTS items" and "seeks confirmation" from the Department that this opinion is correct. In response, the Department notes that Order does not require the Department to provide guidance regarding the definition of COTS items. The Department, however, interprets the use of "commercially available off-the-shelf items" in the Order as subject to the definition of that term in the FAR. *See* Order, section 2(a)(iv); FAR 2.101.

Subcontractor Disclosures

The Proposed Guidance contemplated that subcontractors would disclose Labor Law violations to prime contractors for assessment. *See* 80 FR 30577. However, the Proposed Guidance also noted that "the FAR Council is considering allowing contractors to direct their subcontractors to report violations to the Department, which would then assess the violations" (instead of contractors). *Id.* n.9.

Various industry commenters raised concerns about the original subcontractor disclosure and assessment provision in the Proposed Guidance. In a representative form comment, one commenter stated that the task of assessing subcontractor responsibility under the Order would be overly burdensome for prime contractors, who may have up to 30 subcontractors for a multimillion dollar contract. Another commenter, SAIC, raised a concern with the structure by which subcontractors would give violation information to prime contractors on the grounds that the subcontractor and the prime may be competitors on the next contract, and "competitors should not have access to sensitive information about one another."

In contrast, another commenter objected to the structure of the proposed alternative. In a comment made to the FAR Council on the proposed FAR rule, the commenter questioned whether there might be conflicts of interest if the Department is given the authority to assess subcontractor violations. The commenter suggested that a conflict could arise because the Department would often be charged with classifying and assessing the weight of violations that may be under active enforcement or litigation by enforcement agencies within the Department; presumably the concern would be that the Department could tip the scales in its own ongoing litigation by providing a more negative assessment of the subcontractor's record than it might otherwise do in order to force the contractor into settling.

After carefully considering these and other similar comments, the FAR Council decided to adopt the proposed alternative structure under which subcontractors will be able to make detailed disclosures to the Department instead of to prime contractors directly. *See* FAR 52.222–59(c)(3)(ii). Pursuant to Order (as amended), the FAR Council has the express authority to designate the entity to which subcontractors submit disclosure information.

Under the final FAR rule, upon receiving a subcontractor's disclosure, the Department will provide advice that the subcontractor provides to the contractor for the contractor's use in the determining the subcontractor's responsibility. *See FAR* 52.222–59(c)(4). Ultimately, however, the Order does not change the underlying principle in the FAR that it is the prime contractor (and not the Department) that has the duty to make a determination that its subcontractors are responsible sources. *See* id. 9.104–1.

The FAR Council and the Department have carefully considered the concern that the structure of the subcontractor responsibility assessment would create a conflict of interest, and we have concluded that the proposed structure is appropriate. ALCA training will include material that addresses prevention of such conflicts of interest. The Guidance clarifies that in assessing violations, the Department will apply the same Guidance language that ALCAs apply in classifying and weighing violations and that any Labor Law decisions from an enforcement agency will be evaluated objectively and without regard for the enforcement agency's litigation interests. *See* Guidance, section V(B). As the FAR Council notes in its response to this issue, administrative decision makers enjoy a presumption of honesty and integrity. *See Withrow* v. *Larkin,* 421 U.S. 35, 47 (1975). Moreover, if the subcontractor disagrees with the Department about the assessment, it may provide an explanation of its disagreement, along with the relevant information, to the contractor, FAR 52.222–59(c)(4)(ii)(C)(3), and in this situation the contractor may award the subcontract notwithstanding the Department's negative assessment, *id.* 52.222–59(c)(5).

In sum, the Department has tracked the FAR rule in the final Guidance. The Department believes that the FAR Council's modification of the subcontractor responsibility structure will address the above-described concerns that contractors (and especially small business contractors) would find it challenging to assess subcontractors' violations. This change will also ensure a greater degree of expertise and consistency in assessing subcontractors' Labor Law violations.

VI. Preassessment

The Proposed Guidance noted that the Department will be available to consult with contractors to assist them in fulfilling their obligations under the Order, and, specifically, that contractors would have the opportunity to receive early guidance before bidding on a contract. In this "preassessment," contractors would receive the Department's advice as to "whether any of their violations of the labor laws are potentially problematic, as well as the opportunity to remedy any problems." 80 FR 30575 n.7.

The Department received few comments specifically addressing preassessment. However, several commenters stated that contracting agencies must provide enough time for ALCAs to assess the information disclosed regarding violations, mitigating circumstances, and remedial measures. Many commenters stated that the 3-day timeframe for ALCAs to give analysis and advice to contracting officers is insufficient and will cause delays in decision-making. The Department believes that the preassessment process will help avoid such delays. With regard to subcontractor preassessment, AGC stated in its comment that "pre-approving national subcontractors may be helpful," while noting that there are disadvantages to limiting the pool of acceptable subcontractors to those that have been pre-approved.

After considering these comments, the Department has decided that there will be a preassessment process whereby contractors may voluntarily agree to have their record of Labor Law violations assessed by the Department. The preassessment process does not limit the pool of contractors in the manner that AGC suggested could be disadvantageous. Rather, preassessment will provide contractors with early information that their record of Labor Law compliance is satisfactory—and, if that is not the case, with information about how to address any issues before bidding on a contract. The preassessment process does not circumvent or replace the structured preaward disclosure and assessment process required by the Order.

The Guidance now clarifies that the Department's advice during preassessment is similar to the analysis that ALCA's provide to contracting officers during the preaward assessment process—including "advice regarding whether any of the disclosed violations are serious, repeated, willful, and/or pervasive; and regarding whether a labor compliance agreement is warranted." Guidance, section VI. And, it clarifies that if a contractor whose record have been assessed by the Department subsequently submits a bid, and the contracting officer initiates a responsibility determination of the contractor, the contracting officer and the ALCA may rely on the Department's assessment that the contractor has a satisfactory record of Labor Law compliance unless additional Labor Law violations have been disclosed.

VII. Paycheck Transparency

Section VII of the Guidance assists agencies in interpreting the paycheck transparency provisions of the Order and the FAR rule. The purpose of these provisions is to increase transparency in compensation information and employment status, which will enhance workers' awareness of their rights, promote greater employer compliance with Labor Laws, and thereby increase economy and efficiency in government contracting.

A. Wage Statement Provisions

Section 5(a) of the Order requires covered contractors, including subcontractors, to provide "all individuals performing work" under the contract for whom the contractor must maintain wage records under the FLSA, the DBA, the SCA, or equivalent State laws with a "document" each pay period containing "information concerning that individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay." As the Department noted in the Proposed Guidance, this means that a wage statement must be provided to every worker subject to the FLSA, all laborers and mechanics subject to the DBA, and all service employees covered by the SCA—regardless of the contractor's classification of the worker as an employee or independent contractor. *See* 80 FR 30591.

In the Proposed Guidance, the Department interpreted the term "pay" in the Order to mean the total or "gross pay" that is due the worker for the pay period. 80 FR 30591. The Proposed Guidance noted that additions to gross pay may include bonuses, awards, and shift differentials, and that deductions from gross pay may include withholding for taxes and for employee contributions to health insurance premiums or retirement accounts. 80 FR 30591–30592.

The Order requires that the wage statement must be issued every pay period and contain the total number of hours worked in the pay period and any overtime hours worked, among other information. Order, section 5(a). In those cases where the wage statement is not provided weekly and is instead provided bi-weekly or semi-monthly, the FAR Council's proposed rule provided that the hours worked and overtime hours detailed in the wage statement be broken down to correspond to the period for which overtime is actually calculated and paid (which will almost always be weekly). 80 FR 30571.

The Proposed Guidance suggested that if the contractor regularly provides documents to workers electronically, the wage statement may be provided electronically if the worker can access it through a computer, device, system, or network provided or made available by the contractor. 80 FR 30591. The FAR Council proposed the requirement that, if a significant portion of the contractor's workforce is not fluent in English, the contractor must provide the wage statements in English and the language(s) in which the significant portion(s) of the workforce is fluent. 80 FR 30572.

The Department received many comments regarding the different aspects of the proposed wage-statement requirements discussed above. Employee advocates generally supported the Order's wage-statement provisions.[78] Employer organizations, on the other hand, commented that the wage-statement provisions are overly burdensome and in addition made several specific suggestions and objections. The Department addresses these comments below.

1. Rate of Pay

Several unions and employee advocacy organizations suggested that contractors should be required to include in the wage statement: (a) The worker's rate of pay, (b) hours and earnings at the basic rate, and (c) hours and earnings at the overtime rate. In their view, these would allow "a worker to fully understand the basis for his or her net pay." They argued that the term "pay" in the Order should be defined to include both the worker's regular rate of pay and the total amount of pay for the pay period. SEIU noted that several States, including Alaska, California, New York, and Hawaii, already require rate-of-pay information in wage statements, "demonstrating the reasonableness of this requirement." The Midwest Region Foundation for Fair Contracting and the Foundation for Fair Contracting of Massachusetts suggested that the wage statement should include the "overtime rate of pay and hours calculated," reasoning that the "rate of pay alone is not sufficient for a worker to calculate his or her overtime hours[.]" The Center for American Progress Action Fund (CAPAF) and SEIU also suggested that the Guidance "should make clear that the terms used in the paycheck transparency provisions have the same meaning as they do under the FLSA."

In response to similar comments, the FAR Council has included in its final rule that rate-of-pay is a required element on the wage statement. *See* FAR 52.222–60(b)(1)(iii). The Department has modified the final Guidance accordingly. The Department believes that this decision accords with the plain text of the Order, which states that the wage statement must contain the worker's "pay." Order, section 5(a). As the commenters above noted, the term "pay" can and should be defined to include both "gross pay" and "rate of pay."

The Department believes that a worker's rate of pay is a crucial piece of information that should appear in the wage statement, because a worker's knowledge of his or her rate of pay enables the worker to more easily determine whether all wages due have been paid. Inclusion of rate of pay in wage statements will therefore reduce the time an employer spends resolving pay disputes because workers will have available the information on which his or her pay was determined, and be able to identify any problems at an earlier date. By aiding in the early identification of problems, including rate of pay in the wage statement will help to implement the Order's purpose of reducing execution delays and avoiding distractions and complications that arise from Labor Law noncompliance during the course of contract performance. *See* Order, section 1. All parties have an interest in ensuring workers receive their full pay when it is earned—including contractors themselves, who benefit from fair competition, employee satisfaction, and reduced liability for damages resulting from unpaid wages.

Also, in most cases, contractors compute gross pay by multiplying the regular hours worked by the worker's rate of pay and, in overtime workweeks, by also multiplying the overtime hours worked by time-and-one-half of the rate of pay. As contractors cannot compute the worker's earnings without the rate-of-pay information, workers similarly cannot easily determine how their earnings are computed without inclusion of the rate-of-pay information in the wage statement.

Moreover, the relevant laws already require that the employer keep a record of the rate of pay. As one employee-advocacy organization pointed out, an employer must maintain a record of a non-exempt employee's rate of pay under the FLSA. *See* 29 CFR 516.2(a)(6)(i). A requirement to keep rate-of-pay information also applies to SCA-covered contracts, *see* 29 CFR 4.6(g)(1)(ii), and to DBA-covered contracts, *see* 29 CFR 5.5(a)(3)(i).[79] In addition, a number of States currently require the worker's rate of pay to be included in wage statements.[80] Contractors located in one of these States already are including the rate of pay in the wage statements that they provide. Therefore, including this information in the wage statement helps to realize the purposes of the Order with limited burden to contractors.

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[78] The Department received many comments generally supporting the paycheck transparency provisions, including more than 1,700 comments submitted by the National Women's Law Center (NWLC).

The rate of pay information on the wage statement will most often be the regular hourly rate of pay. If the worker is not paid by the hour, the rate of pay information should reflect the basis of pay by indicating the monetary amount paid on a per-day, per-week, per-piece, or other basis. *See* FAR 52.222–60(b)(1)(iii). This information is required to be kept by the employer for non-exempt employees under the FLSA, and would allow the worker to recognize any underpayments. *See* 29 CFR 516.2(a)(6)(i)–(ii), 778.109.

The Department, however, believes that it is not essential for the overtime rate of pay to be included in the wage statement. For example, in order to check the accuracy of the wages paid in weeks when overtime hours are worked, a worker can generally perform the following calculation: (1) The rate of pay multiplied by 40 hours equals regular earnings; (2) rate of pay multiplied by 1.5 equals the overtime rate of pay; (3) overtime rate of pay multiplied by the overtime hours worked equal overtime earnings; and (4) regular earnings plus overtime earnings equals gross pay. The inclusion of the overtime rate of pay in the wage statement would only slightly simplify this calculation for the worker by eliminating step two. In most situations, once the worker knows his or her rate of pay, the worker can readily determine what the overtime pay rate should be by simply multiplying the rate of pay by time and one half (by a factor of 1.5).

In addition, the FLSA, SCA, and DBA regulations do not require contractors to keep a record of the overtime pay rate in their payroll records.[81] Similarly, with some exceptions, State laws generally do not require that the overtime rate of pay be included in wage statements. Therefore, requiring the overtime rate of pay in the wage statement would be a new burden on contractors and, as discussed above, having the overtime pay-rate information in the wage statement does not significantly improve the worker's ability to determine whether the correct wages were paid.

With regard to SEIU's comment that the Guidance should make clear that the terms used in the Order's paycheck transparency provision should be given the same meaning as in the FLSA, the Department agrees with this comment to the extent the FLSA provides relevant meaning and context to the terms in the Order's paycheck transparency provisions. The Department has cited to the FLSA regulations where applicable.

2. Itemizing Additions to and Deductions From Wages

Employee advocates urged the Department to require contractors to itemize additions to and deductions from wages in the wage statement. SEIU stated that there should be "no lump sums for additions or deductions." The AFL–CIO urged the Department to require contractors to "itemize the contributions for fringe benefits and identify each plan or fund to which such contributions are being paid." NABTU noted that a number of States require contractors to itemize in this manner in the certified payroll records that are filed with the State. The Indiana-Illinois-Iowa Foundation for Fair Contracting (Foundation for Fair Contracting) suggested that wage statements required by the Order should include the hourly fringe benefit rates, the name and address of each fringe benefit fund, and the plan sponsor and administrator of each fringe benefit plan, if applicable. Foundation for Fair Contracting noted that the Illinois Prevailing Wage Act requires contractors on public-works projects to submit certified payrolls that contain such information.

In response to similar comments, the FAR Council has included in its final rule the requirement that additions and deductions to gross pay must be itemized in the wage statement. *See* FAR 52.222–60(b)(1)(v). Accordingly, the final Guidance clarifies that additions and deductions must be itemized.

The Department agrees that it is appropriate to require itemization of additions and deductions. Section 5(a) of the Order provides that the wage statement should, among other items, include "any additions made to or deductions made from pay." The Order, therefore, already contemplates that any and all additions or deductions be separately noted in the wage statement; in other words, the wage statement must itemize or identify each addition or deduction, and not merely provide a lump sum for the total additions and deductions.

The Department notes that the relevant FLSA regulations require covered employers to maintain records regarding the nature of each type of addition to or deduction from gross wages. For instance, besides having to record the total additions to or deductions from wages, the FLSA regulations at 29 CFR 516.2(a)(10) also require covered employers to maintain records for non-exempt employees of the dates, amounts, and nature of the items which make up the total additions and deductions. Also, both DBA and SCA regulations require covered contractors to maintain a record of deductions from wages paid. *See* 29 CFR 5.5(a)(3)(i), 4.6(g)(1)(iv).[82] Because these statutes already require contractors to maintain a record of any additions or deductions, requiring contractors to provide the same itemized information to workers in the wage statement will not be overly burdensome.

The Department did not receive comments specifically objecting to the itemization of additions or deductions. Many States currently require itemized deductions to be included in wage statements.[83] Contractors working in

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[79] In general, for DBA and SCA, the basic hourly rate listed in the wage determination is considered the rate of pay that is to be included in the wage statement. Under the FLSA, the regular hourly rate of pay is determined by dividing the employee's total remuneration (except statutory exclusions) by total hours worked in the workweek. *See* 29 CFR 778.109.

[80] States that currently require rate of pay information to be included in wage statements are: Alaska, California, Colorado, Hawaii, Kansas, Maryland, Massachusetts, Minnesota, New York, North Dakota, Pennsylvania, Texas, Vermont, Washington, and Wisconsin. This list is not the list of "Substantially Similar Wage Payment States" that the Order requires the Department to identify. As discussed below, whether a State law is substantially similar requires consideration of all of the required elements in a wage statement—not simply rate of pay.

[81] Of the three Federal statutes referenced in section 5(a) of the Order, only the FLSA requires the payment of overtime; however, the FLSA recordkeeping regulations do not require the contractor to maintain overtime rates of pay on payroll records. The FLSA regulations do require a supplemental record documenting the overtime pay calculation. *See* 29 CFR 516.6(a)(2). The DBA and SCA do not contain an overtime pay provision and, as a result, the regulations governing these statutes make no reference to listing overtime rates of pay on payroll records. *See* 29 CFR 5.5(a)(3)(i) and 5.32(a) for DBA; 29 CFR 4.6(g) and 4.180 for SCA.

[82] Optional form WH–347 that is typically used by contractors and subcontractors on Federal or federally-aided construction-type contracts and subcontracts to submit weekly certified payrolls, for instance, lists deductions from the worker's gross pay.

[83] States that currently require itemized deductions include: Alaska, Connecticut, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maine,

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one of these States are already including itemized deductions from gross pay in the wage statements that they provide. The Department thus believes that it is reasonable to presume that contractors who already furnish wage statements usually provide information identifying any additions or deductions from gross pay.

Moreover, including itemized additions and deductions in the wage statement allows workers to determine whether they are paid correctly, identify any error, and promptly raise any questions with the contractor as necessary. As the Department noted in the Proposed Guidance, "[p]roviding a worker with gross pay and all additions to and deductions from gross pay will necessarily allow the worker to understand the net pay received and how it was calculated." 80 FR 30592.

With regard to suggestions by employee advocates that the wage statements should identify the name and address of each fringe benefit fund, and the plan sponsor and administrator of each fringe benefit plan, the Department believes that listing such information in the wage statement would be duplicative. Generally, when a worker participates in a fringe benefit fund or plan, he or she must complete an enrollment form for the fund or plan to become a registered participant in the fund or plan. An enrolled or registered worker is given a document with the fund or plan contact information including, but not limited to: The name of the fund or plan; the fund's or plan's address, contact number, and email address; and the amount of the worker's contributions into the fund or plan. The worker also receives quarterly earnings statements or plan usage statements, as well as a summary of worker contributions. *See* 29 CFR 2520.102–2, .102–3. This information is also typically available online via the fund's or plan's Web site. Furthermore, the fund or plan contact information is not essential in order to understand and calculate the worker's earnings on a pay period basis or to timely detect errors in their pay; therefore, the Department does not believe that including this information in the worker's wage statement is necessary to meet the Order's requirements and purposes.

Foundation for Fair Contracting also requested that the hourly fringe-benefit rate be listed in the wage statement. The Department does not believe it is essential to include the hourly fringe-benefit rate in the wage statement. The amount of the fringe benefit required by the DBA or SCA is typically expressed as an hourly rate in the wage determinations issued by the Department.[84] The contractor may pay this amount as a contribution to a fringe benefit fund or plan, or in "cash" as an addition to the worker's wages. Section 5(a) of the Order requires any additions made to gross pay to be listed in the wage statement. The Department believes that fringe-benefit amounts paid by the contractor into a fund or plan (*e.g.*, health insurance or retirement plan) on behalf of the worker should not be considered additions to the worker's gross pay for purposes of the Order. Such fringe-benefit contributions are excludable from the regular rate for purposes of computing overtime pay under the FLSA[85] and are not taxable. Fringe-benefit contributions paid by the contractor on behalf of the worker thus do not need to be included in the wage statement, as such information has no bearing on determining whether the worker received the correct cash wages as reported in the wage statement.

On the other hand, when the contractor elects to meet their fringe benefit obligation under the DBA or SCA by paying all or part of the stated hourly amount in "cash" to the worker, the payments are subject to tax withholdings, and the wage statement should list the fringe benefit amounts paid as an addition to the worker's pay.[86] Such amounts are part of gross pay.

3. Information To Be Included in the Wage Statement

As discussed above, in order to implement the purposes of the Order's wage-statement requirement, the final FAR rule has interpreted the term "pay" to mean both gross pay and rate of pay. *See* FAR 52.222–60(b)(1). And the final rule has clarified that any additions to or deductions made from gross pay be itemized or identified in the wage statement. *See id.* The final Guidance, therefore, provides that wage statements required under the Order must contain the following information: 1) hours worked, 2) overtime hours, 3) rate of pay (whether the regular hourly rate of pay or the monetary amount paid on a per-day, per-week, per-piece, or other basis), 4) gross pay, and 5) an itemization of each addition to or deduction from gross pay. *See* Guidance, section VII(A).[87]

4. Weekly Accounting of Overtime Hours Worked

The Department also received comments from industry commenters regarding the proposed requirement that if the wage statement is not provided weekly and is instead provided bi-weekly or semi-monthly (because the pay period is bi-weekly or semi-monthly), that the hours worked and overtime hours contained in the wage statement would need to be broken down to correspond to the period for which overtime is actually calculated and paid (which will almost always be weekly). *See* 80 FR 30571 (proposed rule); 80 FR 30591 (Proposed Guidance). Several employer representatives stated that contractors generally issue wage statements on a bi-weekly basis, and do not separately provide the number of hours worked (regular and overtime hours) for the first and second workweeks of the bi-weekly pay period. These commenters stated that requiring a weekly accounting of regular hours worked (*i.e.*, hours worked up to 40 hours) and overtime hours worked in the wage statement would be costly to implement and unnecessary.

The final FAR rule continues to require that "the hours worked and overtime hours contained in the wage statement . . . be broken down to correspond to the period (which will almost always be weekly) for which overtime is calculated and paid." FAR 52.222–60(b)(2). The Department accordingly declines to change the Guidance in response to the comments received.

As the Department discussed in the Proposed Guidance, transparency in the relationships between employers and their workers is critical to workers' understanding of their legal rights and to the speedy resolution of workplace disputes. *See* 80 FR 30591. The calculation of overtime pay on a workweek-by-workweek basis as

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Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. This list is not the list of "Substantially Similar Wage Payment States" that the Order requires the Department to identify. As discussed below, whether a State law is substantially similar requires consideration of all of the required elements in a wage statement—not simply of itemized additions and deductions.

[84] The wage determination issued under the DBA and SCA that is applicable to the contract must be posted by the contractor at the site of work in a prominent and accessible place where it can be easily seen by the workers. *See* 29 CFR 5.5(a)(1)(i), 4.6(e). Workers therefore have access to fringe benefit rate information, further negating the necessity to include the fringe benefit rate amount in the wage statement.

[85] *See* 29 U.S.C. 207(e)(4); 29 CFR 778.214, 778.215.

[86] When the fringe benefit (or a portion thereof) is paid in cash, that amount is excludable from the regular rate for purposes of computing overtime pay. *See* 29 CFR 4.177(e), 5.32(c)(1).

[87] Nothing prohibits the contractor from including more information in the wage statement (*e.g.*, exempt-status notification, overtime-pay rate).

required by the FLSA has been a bedrock principle of labor protections since 1938. 29 U.S.C. 207(a). A wage statement that is provided bi-weekly or semi-monthly that does not separately state the hours worked during the first workweek from those worked during the second workweek of the pay period fails to provide workers with sufficient information about their pay to be able to determine if they are being paid correctly. For example, a worker who receives a wage statement showing 80 hours worked during a bi-weekly pay period and all hours paid at the regular (straight-time) rate may, in fact, have worked 43 hours the first week and 37 hours the second week. In this case, to comply with the FLSA, the employer should have paid the worker at time and one half of the worker's regular rate of pay for the three hours worked after 40 hours in the first workweek. Without documentation of the weekly hours, it would be difficult for this worker to determine whether overtime pay is due.

The FLSA already requires that employers calculate overtime pay after 40 hours worked per week; and the implementing regulations under the FLSA, DBA, and SCA require employers to maintain payroll records for at least 3 years. Under the FLSA regulations at 29 CFR 516.2(a)(7), for instance, an employer must maintain a record of a non-exempt employee's total hours worked per week. A requirement to keep records of hours worked also applies to SCA-covered contracts, *see* 29 CFR 4.6(g)(1)(iii), and to DBA-covered contracts, *see* 29 CFR 5.5(a)(3)(i). Moreover, workers covered under DBA must be paid on a weekly basis requiring a workweek-by-workweek accounting of overtime hours worked. *See* 29 CFR 5.5(a)(1)(i). Therefore, including hours worked information in the wage statement derived on a workweek basis will not be overly burdensome.

5. Electronic Wage Statements

With regard to providing wage statements electronically, one industry commenter agreed that providing wage statements electronically should be an option. One labor union, the United Brotherhood of Carpenters and Joiners of America (UBCJA), advocated that workers should be allowed to access wage statements using the contractor's computer network during work hours. According to UBCJA, merely providing workers with the Web site address to access their wage statements on their own would be insufficient as such an arrangement would require the worker to purchase internet connection to access the information. One employee advocate suggested that the contractor should be allowed to provide wage statements electronically only with written permission from the worker and if written instructions on how to access the wage statements are provided to the worker.

The final FAR rule provides that contractors have the option of providing wage statements either by paper-format (*e.g.*, paystubs), or electronically if the contractor regularly provides documents electronically and if the worker can access the document through a computer, device, system, or network provided or made available by the contractor. FAR 52.222–60(e)(2). The final Guidance accordingly provides the same. *See* Guidance, section VII(A). The Department agrees with UBCJA that merely providing workers with a Web site address would be insufficient; the contractor must provide the worker with internet or intranet access for purposes of viewing this information.

The Department, however, believes that it is not necessary to require contractors to allow workers such access during work hours. The Department assumes that employees will, in most cases, access wage statements (or other employer-provided documents, such as leave statements or tax forms) using the contractor's network or system during the workday—including during the worker's rest breaks or meal periods. However, the Department believes it is not necessary to specifically prescribe a requirement regarding the time period during which a wage statement can be accessed.

The Department also believes that it is not necessary to require that workers give consent before receiving the wage statement electronically, or to require that workers be given written instructions on how to access the wage statement using the contractor's computer, device, system, or network. As the Proposed Guidance noted, the employer must already be regularly providing documents to workers electronically in order to provide wage statements in the same manner. *See* 80 FR 30592. Contractors that already provide documents electronically presumably also provide general instructions regarding accessing personnel records on their intranet Web pages; therefore, additional written instructions specific to accessing the worker's wage statement using the contractor's computer, device, network, or system is not necessary. Similarly, requiring a written consent by the worker is not necessary because the workers for such employers should already be familiar with the process for receiving documents electronically.

6. Substantially Similar State Laws

The Order provides that the wage-statement requirement "shall be deemed to be fulfilled" where a contractor "is complying with State or local requirements that the Secretary of Labor has determined are substantially similar to those required" by the Order. Order, section 5(a). If a contractor provides a worker in one of these "substantially similar" States with a wage statement that complies with the requirements of that State, the contractor would satisfy the Order's wage-statement requirement. In the Proposed Guidance, the Department stated that two requirements do not have to be exactly the same to be "substantially similar"; they must, however, share "essential elements in common." 80 FR 30587 (quoting *Alameda Mall, L.P.* v. *Shoe Show, Inc.*, 649 F.3d 389, 392 (5th Cir. 2011)). The Proposed Guidance offered two options for determining whether State requirements are substantially similar to the Order's requirements.

The first proposed option identified as substantially similar those States and localities that require wage statements to have the essential elements of overtime hours or earnings, total hours, gross pay, and any additions to or deductions made from gross pay. As the Proposed Guidance noted, when overtime hours or earnings are disclosed in a wage statement, workers can identify from the face of the document whether they have been paid for overtime hours. Applying this method, the current list of Substantially Similar Wage Payment States would be Alaska, California, Connecticut, the District of Columbia, Hawaii, New York, and Oregon. *See* 80 FR 30592.

The second proposed option would have allowed wage statements to omit overtime hours or earnings, as long as the wage statements included "rate of pay," in addition to the essential elements of total hours, gross pay, and any additions to or deductions made from gross pay. The intent of this option was to allow greater flexibility while still requiring wage statements to provide enough information for a worker to calculate whether he or she has been paid in full. The Department noted that one drawback of this option was that failure to pay overtime would not be as easily detected when compared with the first option. The worker would have to complete a more difficult calculation to identify an error in pay. Applying this second method, the current list of Substantially Similar Wage Payment States would be Alaska, California, Connecticut, the District of Columbia, Hawaii, Massachusetts, Minnesota, New York, Oregon, Pennsylvania, Texas, Vermont, Washington, and Wisconsin. *See* 80 FR 30592.

The Department requested comments regarding the two options and stated that it could also consider other combinations of essential elements or other ways to determine whether State or local requirements are substantially similar. 80 FR 30592.

Numerous employee advocates and members of Congress strongly supported the first option. These commenters observed that employers and workers benefit when workers can easily understand their pay by reviewing their wage statement. These commenters noted that wage statements also provide an objective record of compensated hours, which helps employers to more easily meet their burden of demonstrating wages paid for hours worked. National Employment Law Project (NELP), the National Women's Law Center (NWLC), and the Service Employees International Union (SEIU) thus advocated for the first option because it brings "greater . . . clarity on the face of the wage statement," making it "easier . . . for an employee to notice any errors and bring them to the attention of her employer." A comment by members of Congress favored the first option because "[d]isclosing whether workers have been paid at the overtime rate is critical to enabling workers to discern whether they have been paid fairly." While recommending the first option, SEIU and CAPAF further recommended that the first option be adopted with the modification that rate-of-pay information also be included as an essential element.

The employee advocates found the second option—which would have allowed wage statements to omit overtime hours or earnings, as long as the wage statements include the rate of pay—to lack transparency. The American Federation of State, County, and Municipal Employees (AFSCME) stated that workers "should not be required to apply a mathematical formula to determine the accuracy of wage payment." The United Food and Commercial Workers (UFCW) noted that omitting overtime hours and earnings "will impede employees' ability to recognize whether employers have failed to pay workers overtime." The second option is less transparent, according to the NWLC, because it makes "it more difficult and confusing for employees to understand their paychecks." The UBCJA stated that overtime hours or earnings are vital pieces of information that should not be omitted as such information is "necessary to protect workers in low-wage industries who are the most likely to be exploited and the least likely to have the math skills" required to determine if the wage paid is accurate. As NELP pointed out, contractors have workers' overtime hours and earnings readily available as they are required to retain this information under the law; it would, therefore, not be burdensome to require such information on wage statements.

On the other hand, the Aerospace Industries Association (AIA) recommended that the second option be adopted, primarily because it would result in more substantially similar States and localities than would the first option—thereby reducing compliance burdens and providing greater flexibility to contractors. Associated Builders and Contractors (ABC) also believed the second option "is more in line with employers' practices and is less burdensome than the first option." Citing the paycheck-transparency provisions' alleged "significant burdens," the law firm of Ogletree Deakins encouraged the Department to adopt both options, and include a provision allowing contractors "to design their own substantially similar wage statements that will comply" with the Order. The U.S. Chamber of Commerce (the Chamber) stated that the Proposed Guidance was not clear regarding whether complying the requirement for any one of the substantially similar States (*e.g.,* the California) "means that the contractor has met the [Order's] requirement for all employees or just employees in that State (*i.e.,* California employees)." The Chamber recommended that contractors "be deemed to be in compliance with the wage statement requirements if they adopt one State's version nationwide." Finally, the National Association of Manufacturers (NAM) opposed implementation of any wage-statement requirement until the Department has provided the public an opportunity to comment on the substantially similar State and local wage statement laws the Department ultimately identifies.

After carefully reviewing the comments received regarding the two options discussed above, the Department adopts the first option for determining whether wage-statement requirements under State law are substantially similar. The list of Substantially Similar Wage Payment States now adopted in the final Guidance is: 1) Alaska, 2) California, 3) Connecticut, 4) the District of Columbia, 5) Hawaii, 6) New York, and 7) Oregon. These States and the District of Columbia require wage statements to include the essential elements of hours worked, overtime hours, gross pay, and any itemized additions to and deductions from gross pay. The list of Substantially Similar Wage Payment States will be available on the Department's Web site at *http://www.dol.gov/fairpayandsafeworkplaces/. See also* FAR 52.222–60(c) (providing that the Order's wage-statement requirement is fulfilled if the contractor complies with the wage statement laws of these States and localities).

The Department agrees with employee advocates who commented that the second option—which would allow wage statements to omit overtime hours worked, as long as the wage statements include the rate of pay—is less transparent and helpful to workers. Excluding the overtime hours worked from the wage statement would require a worker to complete a more difficult computation in order to determine whether the correct wages were paid. Moreover, the Department agrees with commenters who noted that including the overtime hours in the wage statement would not be overly burdensome as contractors are already required to keep such information in their payroll records under the FLSA.

With regard to SEIU's comment that the Department should adopt the first option with the modification that the rate of pay be a required item in the wage statement, the Department declines to do so. As set forth in the final FAR rule, rate of pay is a required element of the core wage-statement obligation under the Order. Accordingly, covered workers in most States will receive wage statements that include rate-of-pay information. Only in those States and localities deemed "substantially similar" will it be permissible to provide a wage statement that does not include rate of pay. The Department believes that this accords with the definition of "substantially similar," which means only that the substantially similar laws "share essential elements" with the Order's requirement—not that they be identical. Moreover, the Department notes that four of the States included in the first option (Alaska, California, Hawaii, and New York) do already require wage statements to have the rate-of-pay information.[88] Thus, contractors that have workers in those States will already need to include the rate of pay in their wage statements to comply with

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[88] For Alaska's wage-statement requirements, *see* 8 AAC 15.160(h); for California, *see* Labor Code sec. 226(a); for Hawaii, *see* HRS sec. 387–6(c); and for New York, *see* NY Labor Law, art. 6, sec. 195(3).

State law—regardless of the Department's definition in this Guidance.

The Department disagrees with comments by Ogletree Deakins encouraging the Department to adopt both options. Adopting both options would mean effectively adopting the second option, which the Department has deemed to be not as transparent. The Department also declines to allow contractors "to design their own substantially similar wage statements that will comply" with the Order, as this would likely result in a variety of wage-statement content, and the provision would then be difficult to administer. Moreover, the Order does not give the Department authority to allow contractors to design their own wage statements for purposes of satisfying the Order's "substantially similar" criteria; thus, this specific suggestion is outside the scope of the final Guidance.

The Chamber requested clarification regarding whether complying with a State requirement (*e.g.,* the California State requirement) means that the contractor has met the Federal requirement for all employees or just employees in that State. The Department believes that as long as the contractor complies with the wage-statement requirements of any of the Substantially Similar Wage Payment States, the contractor will be in compliance with the final rule. For example, if a contractor has workers in California and Nevada, the contractor will comply with the final FAR rule if it provides to workers in both States the same wage statements as long as the statements adhere to California State law.[89] In other words, the contractor would be in compliance with the final rule if it adopts the wage-statement requirements of any particular State or locality in the list of Substantially Similar Wage Payment States in which the contractor has workers, and applies this model for its workers elsewhere.

The Department disagrees with NAM's comment opposing implementation of any wage-statement requirement until the Department has specifically identified "the so-called 'substantially equivalent' state and local laws" and provided an opportunity to comment. This comment may have conflated (1) the Department's duty under section 5(a) of the Order to identify State and local wage-statement laws that are "substantially similar" to the Order's wage-statement requirement with (2) the Department's duty under section 2(a) of the Order to identify the State laws that are "equivalent" to the 14 Federal labor laws and Executive orders for which violations must be disclosed.

Finally, the Department received many substantive comments related to the two options discussing whether certain State and local requirements are substantially similar to the Order's wage-statement requirement. The Department developed this final Guidance based on a careful review of the comments received.

7. Request To Delay Effective Date

One employer advocate suggested that the Department and the FAR Council allow Federal contractors time to comply with the wage-statement provisions. The commenter noted that, in the short term, contractors will have to devise manual wage statements to comply with the Order until automated systems are able to generate compliant wage statements. Citing the Department's Home Care rule regarding the application of the FLSA to domestic service, see 78 FR 60454 (Oct. 1, 2013), which had an effective date 15 months after the publication of the final rule, the commenter recommended that contractors be provided at least 12 to 15 months within which to comply with the wage-statement requirement.

The FAR Council Rule provides that the paycheck transparency requirements are effective on January 1, 2017. *See* FAR 22.2007(d). The Department believes that this delay provides a reasonable length of time and is sufficient for contractors to update their systems to comply with the wage-statement provision. Further delaying the effective date of the wage-statement provision is not warranted. As discussed above, the Order's wage-statement requirement is deemed fulfilled where a contractor complies with a State law that the Department has determined to be "substantially similar." And, in States with wage-statement laws that are not substantially similar to the Order's requirements, contractors will need only to supplement the wage statements already provided pursuant to State law in order to conform to the Order's requirements.

Moreover, the Department's enforcement experience has shown that many employers, including Federal contractors, in the small minority of States that do not require wage statements have opted to provide wage statements to their workers as part of their general payroll practice. A contractor in these States may choose either to include in the wage statements all of the information required by the Order, or follow the wage-statement requirements of any of the Substantially Similar Wage Payment States in which it has employees. Finally, as discussed above, all of the information required to be included in the wage statement consists of items that contractors already maintain as part of their normal recordkeeping obligations and general bookkeeping or payroll practices. The provisions of the wage-statement requirement, in large part, require contractors only to fine-tune the wage statements they already provide to workers to include any additional required information.

8. FLSA Exempt-Status Notification

According to the Order, the wage statement provided to workers who are exempt from the overtime pay provisions of the FLSA "need not include a record of hours worked if the contractor informs the individuals of their exempt status." Order, section 5(a). Because such workers do not have to be paid overtime under the FLSA, hours-worked information need not be included in the wage statement. *See* 80 FR 30592. Thus, if the contractor determines that a worker is exempt from overtime pay under the FLSA and intends to not include the worker's hours-worked information on the wage statement provided to the worker, notification of the worker's exempt status must be provided to the worker first.

The Department suggested in its Proposed Guidance that in order to exclude the hours-worked information in the wage statement, the contractor would have to provide a written notice to the worker stating that the worker is exempt from the FLSA's overtime pay requirements; oral notice would not be not sufficient. 80 FR 30592. The final FAR rule provides that such notices of exempt status must be in writing. FAR 52.222–60. The Department further proposed that if the contractor regularly provides documents to workers electronically, the document informing the worker of his or her exempt status may also be provided electronically if the worker can access it through a computer, device, system, or network provided or made available by the contractor. 80 FR 30592. The FAR Council adopted this proposal regarding electronic notice in its final rule. *See* FAR 52.222–60. Finally, the proposals suggested that if a significant portion of the contractor's workforce is not fluent in English, the document provided notifying the worker of exempt status must also be in the language(s) other than English in which the significant portion(s) of the workforce is fluent.[90] *See* 80 FR 30592. The FAR Council adopted this translation requirement in its final rule. *See* FAR 52.222–60.

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[89] California is among the States included in the list of Substantially Similar Wage Payment States, while Nevada requires minimal information in the wage statement provided to workers.

The Department received comments regarding the following issues related to FLSA exempt status: Type and frequency of the notice, differing interpretations by the courts regarding exemptions under the FLSA, and phased-in implementation.

a. Type and Frequency of the Notice

One labor union commented that the contractor should be excused from recording the overtime hours worked in the wage statement only if the worker is correctly classified as exempt from the FLSA's overtime pay requirements. The commenter also recommended that workers should be informed of their exempt status on each wage statement. An employer-advocate requested clarification on whether the exempt-status notice should be provided once (*e.g.,* in a written offer of employment) or on a recurring basis (*e.g.,* on each wage statement).

With regard to the labor union's comment on the importance of correctly determining the exempt status of a worker under the FLSA, the Department agrees that employers should correctly classify their workers, but does not changes the Guidance in the manner suggested. An employer who claims an exemption from the FLSA is responsible for ensuring that the exemption applies. *See Donovan* v. *Nekton, Inc.,* 703 F.2d 1148, 1151 (9th Cir. 1983). However, the fact that an employer provides the exempt-status notice to a worker does not mean that the worker is necessarily classified correctly. The Department will not consider the notice provided by the contractor to the worker as determinative of or even relevant to the worker's exempt status under the FLSA. Therefore, the FAR has clarified that a contractor may not in its exempt-status notice to a worker indicate or suggest that the Department or the courts agree with the contractor's determination that the worker is exempt. *See* 52.222–60(b)(3). The Department has modified the Guidance to reflect this clarification.

With regard to the type of notice to be provided to the worker and how often it should be provided, the final FAR rule requires that contractors provide notice to workers one time before the worker performs any work under a covered contract, or in the worker's first wage statement under the contract. *See* 52.222–60(b)(3). After carefully reviewing the comments received, the Department believes that this requirement is sufficient. If during performance of the contract, the contractor determines that the worker's status has changed from non-exempt to exempt (for example, because of a change in the worker's pay, duties, or both), it must provide notice to the worker either (a) prior to providing a wage statement without hours worked information or (b) in the first wage statement after the change. *See id.* The notice must be in writing; oral notice is not sufficient. *See id.* The notice can be a stand-alone document or be included in the offer letter, employment contract, position description, or wage statement provided to the worker. *See id.*

The Department does not believe it is necessary to require a contractor to include the exempt-status information on each wage statement. Although it is permissible to provide notice on each wage statement, it is also permissible to provide the notice one time before any work on the covered contract is performed or one time upon a change from non-exempt to exempt status during the performance of the contract. If the contractor provides such a one-time notice, there is no need to provide notice in each wage statement. If the worker's status later changes from exempt to non-exempt, no notice of the change is required under the Order, but the contractor must thereafter include hours worked information on the wage statements provided to the worker.

b. Differing Interpretations by the Courts of an Exemption Under the FLSA

One industry commenter stated that it would not be prudent to require employers to report on the exempt or non-exempt status of workers where there is disagreement among the courts on who is and who is not exempt under the FLSA. The commenter noted that, for example, while two Circuit Courts have held that service advisors are exempt "salesmen" under section 13(b)(10)(A) of the FLSA, the Ninth Circuit disagreed and found that the exemption is inapplicable to service advisors. *See, e.g., Navarro* v. *Encino Motorcars, LLC,* 780 F.3d 1267 (9th Cir. 2015).[91]

The Department understands that some court decisions regarding the exemption status of certain workers under the FLSA may not be fully consistent. The Department, however, does not find this to be a persuasive reason to relieve contractors from providing the exempt-status notice to employees. Regardless of any inconsistency in court decisions, contractors already must make decisions about whether to classify their employees as exempt or non-exempt under the FLSA in order to determine whether to pay them overtime. Such determinations are based on the facts of each particular situation, the statute, relevant regulations, guidance from the Department, and advice from counsel. In addition, in making these determinations, contractors already must consider any inconsistent court decisions.

The Order does not change this status quo. Under the Order, the contractor retains the authority and responsibility to determine whether to claim an exemption under the FLSA. All that is required under the Order is notice to the workers of the status that the employer has already determined. And such notice is only required if the employer wishes to provide workers with a wage statement that does not contain the worker's hours worked.

c. Request To Delay Implementation of the Exempt-Status Notice

One industry association suggested that compliance with the exempt-status notice requirements be postponed until the Department has finalized its proposal to update the regulations defining the "white collar" exemptions under section 13(a)(1) of the FLSA. *See* 80 FR 38515 (July 6, 2015); *http://www.dol.gov/whd/overtime/NPRM2015/.* The white-collar exemptions define which executive, administrative, and professional employees are exempt from the FLSA's minimum wage and overtime pay protections. *See* 29 CFR part 541.

The Department believes that such a delay is unnecessary. The Department published its final rule updating the white-collar exemption regulations on May 23, 2016, *see* 81 FR 32391, and all employers covered by the FLSA will continue to make determinations of FLSA exempt status both before and after the update to the regulations becomes effective on December 1, 2016, *see id.* The Order does not affect this continuing obligation. The only new obligation under the Order is to provide notice to employees of the determination that the contractor has already made—and only if the contractor wishes to provide employees with a wage statement without a record of hours worked. Because contractors will need to make exempt-status determinations regardless of any requirements under the Order, the Department finds the argument that the Order's requirements be delayed for this reason to be unwarranted.[92]

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[90] Translation requirements are also discussed below in the context of the independent contractor notice, in section VII(B)(5) of the section-by-section analysis.

[91] The Supreme Court has since vacated the Ninth Circuit's decision and remanded the case for further proceedings. *See http://www.supremecourt.gov/opinions/15pdf/15–415_mlho.pdf.*

B. Independent Contractor Notice

Section 5(b) of the Order states that if a contractor treats an individual performing work under a covered contract as an independent contractor, then the contractor must provide "a document informing the individual of this [independent contractor] status." Order, section 5(b). Contractors have to incorporate this same provision into covered subcontracts. *See* FAR 52.222–60(f).

The proposed FAR Council rule specified that the notice informing the individual of his or her independent contractor status must be provided before the individual performs any work on the contract. 80 FR 30572. As the Department noted in the Proposed Guidance, the notice must be in writing and provided separately from any independent contractor agreement entered into between the contractor and the individual. *See* 80 FR 30593. The Proposed Guidance also noted that if the contractor regularly provides documents to its workers electronically, the notice may also be provided electronically if the worker can access it via a computer, device, system, or network provided or made available by the contractor. *Id.*

The Proposed Guidance further stated that the provision of the notice to a worker informing the worker that he or she is an independent contractor does not mean that the worker is correctly classified as an independent contractor under the applicable laws. 80 FR 30593. The determination of whether a worker is an independent contractor under a particular law remains governed by that law's definition of "employee" and the law's standards for determining which workers are independent contractors and not employees. *See id.*

The Department received comments from several unions and other employee advocates that were supportive of the Order's independent contractor notice provisions. In contrast, several industry advocates commented that aspects of the independent contractor notice requirement need to be clarified. The Department has organized the comments in the corresponding sections below.

1. Clarifying the Information in the Notice

The Department received comments requesting clarification of the information that should be included in the independent contractor notice. Several employee advocates recommended that the document also notify the worker that, as an independent contractor, he or she is not entitled to overtime pay under the FLSA, is not covered by worker's compensation or unemployment insurance, and is responsible for the payment of relevant employment taxes. One employee advocate recommended that the notice include a statement notifying the worker that the contractor's designation of a worker as an independent contractor does not mean that the worker is correctly classified as an independent contractor under the applicable law. Several commenters suggested that the notice also include information regarding which agency to contact if the worker has questions about being designated as an independent contractor or needs other types of assistance. One labor union also recommended that the Department establish a toll-free hotline that provides more information on misclassification of employees as independent contractors or tools to challenge the independent contractor classification.

One industry commenter suggested that the FAR Council or the Department publish a model independent contractor notice with recommended language. Another industry commenter requested more detailed guidance on what the independent contractor notice should include.

As discussed above, section 5(b) of the Order requires that the worker be informed in writing by the contractor if the worker is to be classified as an independent contractor and not an employee. Thus, the final FAR rule clarifies that the notice must be in writing and provided separately from any independent contractor agreement entered into between the contractor and the individual. *See* FAR 52.222–60(d)(1)).

The Order, however, does not require the provision of the additional information suggested by commenters. The Department believes that notifying the worker of his or her status as an independent contractor satisfies the Order's requirement. Providing such notice enables workers to evaluate their status as independent contractors and raise any concerns. The objective is to minimize disruptions to contract performance and resolve pay issues early and efficiently. If the worker has questions or concerns regarding the particular determination, then he or she can raise such questions with the contractor and/or contact the appropriate government agency for more information or assistance.

As stated above, the fact that a contractor has provided a worker with notice that he or she is an independent contractor does not mean that the worker is correctly classified as an independent contractor. A contractor may not in its notice to a worker indicate or suggest that any enforcement agency or court agrees with the contractor's determination that the worker is an independent contractor. *See* FAR 52.222–60(d)(1). The Department will not consider the notice when determining whether a worker is an independent contractor or employee under the laws that it enforces.

With regard to comments recommending that the Department establish a hotline that provides information on issues involving misclassification of employees as independent contractors, the relevant agencies within the Department already have toll-free helplines that workers and contractors can access to obtain this type of information and for general assistance. Members of the public, for example, can call the Wage and Hour Division's toll-free helpline at 1(866) 4US–WAGE (487–9243), the Occupational Safety and Health Administration at 1(800) 321–OSHA (6742), the Office of Federal Contract Compliance Programs at 1(800) 397–6251. The National Labor Relations Board can be reached at 1(866) 667–NLRB, and the Equal Employment Opportunity Commission can be reached at 1(800) 669–4000. Moreover, the enforcement agencies' respective Web sites contain helpful information regarding employee misclassification.

With regard to comments requesting a sample independent contractor notice, the Department does not believe it is necessary to create a template notice. The Department expects that any notice will explicitly inform the worker that the contractor has made a decision to classify the workers as an independent contractor.

2. Independent Contractor Determination

Several industry commenters suggested that the Department clarify which statute should provide the basis for determining independent-contractor status for purposes of the Order's requirement. These commenters noted that the Proposed Guidance stated that the determination of whether a worker is an independent contractor or employee under a particular law remains governed by that law's definition of "employee." *See* 80 FR 30593. The commenters stated that they are uncertain as to what definition should be used in determining whether a worker is an employee or independent contractor.

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[92] As discussed in section VII(A)(7) of the Guidance, the final FAR rule delays the effective date of the Order's paycheck transparency provisions generally until January 1, 2017.

The Department does not believe that it is necessary or appropriate to pick one specific definition of "employee" for the Order's independent-contractor notice requirement. Employers already make a determination of whether a worker is an employee (or an independent contractor) whenever they hire a worker. The Order does not affect this responsibility; it only requires the contractor to provide the worker with notice of the determination that the contractor has made. If the contractor has determined that the worker is an independent contractor, then the employer must provide the notice.

3. Frequency of the Independent Contractor Notice

The Department received comments regarding the number of times an individual who is classified as an independent contractor and engaged to perform work on several covered contracts should receive notice of his or her independent contractor status. Two industry commenters, for example, noted that an independent contractor who provides services on multiple covered contracts on an intermittent basis could receive dozens of identical notices, resulting in redundancy and inefficiencies. Other industry commenters believed that providing multiple notices for the same work performed on different covered contracts is burdensome and unnecessary. Two industry commenters suggested that an independent contractor agreement between the relevant parties should satisfy the Order's independent contractor notice requirement.

The final FAR rule provides that the notice informing the individual of his or her independent contractor status must be provided at the time that an independent contractor relationship is established with the individual or before he or she performs any work under the contract. FAR 52.222–60(d)(1). The FAR Council has also clarified in its final rule that contractors must provide the independent contractor notice to the worker for each covered contract on which the individual is engaged to perform work as an independent contractor. *See id.* The Guidance reflects this clarification. The Department agrees that there may be circumstances where a worker who performs work on more than one covered contract would receive more than one independent contractor notice. The Department, however, believes that because the determination of independent contractor status is based on the circumstances of each particular case, it is reasonable to require that the notice be provided on a contract-by-contract basis even where the worker is engaged to perform the same type of work. It is certainly possible that the facts may change on any of the covered contracts such that the work performed requires a different status determination. Moreover, if the contractor determines that a worker's status while performing work on a covered contract changes from employee to independent contractor (because the nature of the relationship between the worker and contractor changes), the contractor must provide the worker with notice of independent contractor status before the worker performs any work under the contract as an independent contractor. *See id.* If a contractor provides a worker on a covered contract with an independent contractor notice and later determines that the worker's status under that contract has changed to that of an employee, no notice of the change is required under the Order.

4. Workers Employed by Staffing Agencies

The Department received several comments regarding contractors that use temporary workers employed by staffing agencies and whether these contractors must provide such workers with a document notifying them that they are independent contractors. NAM believed that in such cases, "temporary workers are neither independent contractors nor employees of the contractor." Several industry commenters suggested that the final Guidance clarify that contractors would not be required to provide notice of independent contractor status to temporary workers who are employees of a staffing agency or similar entity, but not of the contractor. Some of these commenters also recommended that the independent contractor status notice be given only to those workers to whom the contractor provides an IRS Form 1099.

In situations where contractors use temporary workers employed by staffing agencies to perform work on Federal contracts, the contract with the staffing agency may be a covered subcontract under the Order. Section 5 of the Order requires that the independent contractor status notice requirement be incorporated into subcontracts of $500,000 or more. *See* Order, section 5(a). If the contract with the staffing agency is a covered subcontract, and the staffing agency treats the workers as employees, then no notices would be required. If the contract with the staffing agency is a covered subcontract, and the staffing agency treats the workers as independent contractors, then the staffing agency (not the contractor) is required to provide the workers with notice of their independent contractor status.[93]

The Department disagrees with comments suggesting that the contractor should provide independent contractor notices only to those workers to whom the contractor already provides an IRS Form 1099. Employers use a Form 1099–MISC to report, among other items, "payments made in the course of a trade or business to a person who is not an employee or to an unincorporated business."[94] The Order does not limit the requirement to provide the independent contractor notice to workers who receive a Form 1099–MISC. To the extent the contractor has classified an individual as an independent contractor for Federal employment tax purposes and provides the individual a Form 1099–MISC, the contractor must provide the individual with the independent-contractor status notice. The Department, however, declines to interpret the Order as limiting the universe of workers who should receive an independent contractor notice to only those workers to whom the contractor already provides a Form 1099.

5. Translation Requirements

The FAR Council's proposed regulations required that if a significant portion of the contractor's workforce is not fluent in English, the document notifying a worker of the contractor's determination that the worker is an independent contractor, and the wage statements to be provided to the worker, must also be in the language(s) other than English in which the significant portion of the workforce is "more familiar.'' 80 FR 30572. The FAR Council's final rule provides a translation requirement. FAR 52.222–60(e)(1).

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[93] When using a staffing agency, a contractor should consider whether it jointly employs the workers under applicable laws. The Department recently issued guidance under the FLSA and MSPA for determining joint employment. *See* "Joint employment under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act," *https://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf.*

[94] *See* "Form 1099–MISC & Independent Contractors," *https://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Form-1099–MISC-&-Independent-Contractors/Form-1099–MISC-&-Independent-Contractors* (last visited July 22, 2016).

The Department received comments requesting clarification regarding what would constitute a ''significant portion'' of the workforce sufficient to trigger the translation requirement. One industry commenter stated that the final Guidance should set a specific threshold. Another stated that the translation requirement is unnecessary and should be removed. One labor union commenter recommended that the term ''significant portion'' of the workforce be defined as 10 percent or more of the workforce under the covered contract.

One industry commenter, AGC, posited a situation where there are various foreign languages spoken in the workplace. AGC requested clarification regarding whether the contractor would be required to provide the wage statement and the independent contractor notice to workers in every language that is spoken by workers not fluent in English. AGC suggested that the wage-statement translation requirement be revised such that the contractor need only provide the wage statement in English and ''in each other language in which a significant portion of the workforce is fluent.''

With regard to translating the independent contractor notice, AGC recommended that this requirement apply only when the company is aware that the worker is not fluent in English. Another industry commenter also stated that it would not be sensible to require contractors to provide notice in Spanish to an independent contractor who only speaks English simply because a significant portion of the contractor's workforce is fluent in Spanish. AGC further advocated that, instead of including the complete translation in each wage statement or independent contractor notice for each worker, contractors should be allowed to provide only a Web site address where the translations are posted.

After carefully reviewing the comments, the Department declines to provide a specific threshold interpreting what would constitute a ''significant portion'' of the workforce sufficient to trigger the translation requirement. The Department notes that this requirement is similar to regulatory requirements implementing two of the Labor Laws, the FMLA, 29 CFR 825.300(a)(4), and MSPA, 29 CFR 500.78. The term ''significant portion'' has not been defined under these regulations, and the lack of a definition or bright-line test has not prevented employers from complying with the requirement. For these reasons, the term is not defined in the final Guidance.

The Department agrees with AGC's suggestion about workplaces where multiple languages are spoken. Where a significant portion of the workforce is not fluent in English, the Department believes that the contractor should provide independent-contractor notices to workers in each language in which a significant portion of the workforce is fluent. However, the Department does not agree with AGC's suggestion that it will be sufficient in all cases to provide a Web site address where the translated notice would be posted. Where workers are not fluent in English, providing a link to a Web site for the translation would be ineffective at providing the required notice.

VIII. Effective Date and Phase-in of Requirements

The effective date of the FAR Council's final rule is October 25, 2016. The Department received various comments related to the effective date of the Order's requirements. These commenters expressed two general concerns: First, about the burden of the disclosure requirements and the need for time to implement the necessary systems to track Labor Law violations; and second, about fairness related to the consideration of Labor Law violations that occurred before the effective date of the FAR rule. As discussed below, the FAR Council is phasing in the effective date of the disclosure requirements to address these concerns. The Department has created a separate section of the Guidance, section VIII, that contains a summary of the relevant provisions.

Phase-in of Disclosure Requirements

Multiple industry commenters expressed concern that contractors would not have time to be prepared for the implementation of the FAR rule unless the effective date of the rule is delayed. One commenter specifically expressed concern that existing contractor staff are not equipped to gather and report all violations. Another expressed concern specifically about the difficulty for prime contractors of making responsibility determinations for their subcontractors, and requested that subcontractor disclosure requirements be phased in over the course of 5 years.

In response to these concerns, the FAR Council has staggered the phase in of the Order's core disclosure requirements. From the October 25, 2016 effective date to April 24, 2017, the Order's prime-contractor disclosure requirements will apply only to solicitations with an estimated value of $50 million or more, and resultant contracts. FAR 22.2007(a) and (c)(1). After April 24, 2017, the prime-contractor disclosure requirements will apply to all solicitations greater than $500,000—which is the amount specified in the Order—and resultant contracts. *Id.* 22.2007(a) and (c)(2); Order, section 2(a). This also applies to the commercial items equivalent for prime contractors, at FAR 52.212–3(s). The subcontractor disclosure requirements are further staggered; they are not effective for the first year of operation of the FAR rule implementing the Order. While the rule overall is effective on October 25, 2016, the subcontractor disclosure requirements are not effective until October 25, 2017. *See* FAR 22.2007(b). This phasing in of the requirements is discussed in the new ''Effective date and phase-in of requirements'' section of the Guidance.

''Retroactivity'' of Disclosure Requirement

With regard to the concern about fairness of disclosing violations prior to the effective date of the FAR rule, a number of commenters expressed concern that the 3-year disclosure period will require contractors to ''retroactively'' disclose Labor Law violations during the rule's first years of operation. For example, the HR Policy Association argued that it is ''fundamentally unfair'' to require contractors to disclose violations Labor Law decisions that were rendered prior to the effective date of the Order and that any disclosure ''should be only prospective in nature.'' The Section of Public Contract Law of the American Bar Association (PCL Section) recommended that the disclosure requirement be phased-in and that only decisions after the disclosure requirement's effective date be disclosed. According to the PCL Section, a phase-in of the 3-year disclosure period would allow ''contractors the opportunity to put systems in place'' and would give ''the federal procurement process time to adapt[.]''

The Department agrees that the requirement to look back 3 years when disclosing Labor Law decisions should be phased-in, and the FAR Council's final rule provides for such a phase-in. *See* FAR 55.222–57(c)(1)–(2), 55.222–58(b). This 3-year disclosure period is being phased in so that contractors will not disclose any decisions that were rendered against them prior to October 25, 2015. In the language of the FAR, disclosures of Labor Law violations must be made for decisions rendered during "the period beginning on October 25, 2015 to the date of the offer, or for 3 years preceding the date of the offer, whichever period is shorter." *Id.* 55.222–57(c)(1)–(2), 55.222–58(b). Thus, full implementation of the 3-year disclosure period will not be reached until October 25, 2018. As a result of this phase-in, contractors will not disclose Labor Law decisions that were rendered against them more than 1 year prior to the effective date of the FAR rule.[95]

Phased Implementation of Equivalent State Laws

The Order directs the Department to define the State laws that are equivalent to the 14 identified Federal labor laws and Executive orders. Order, section 2(a)(i)(O). Contractors are required to disclose violations of these equivalent State laws, in addition to the 14 Federal laws and orders. *See id.* In the Proposed Guidance, the Department proposed that OSHA-approved State Plans should be considered equivalent State laws for purposes of the Order, and stated that the Department would identify additional equivalent State laws in a second guidance to be published in the **Federal Register** at a later date. *See* 80 FR 30574, 30579.

Several commenters expressed concern with this proposed phased implementation and argued that the Guidance is incomplete without identification of all equivalent State laws. A number of them argued that without knowing all of the equivalent State laws, employers are unable to estimate the costs associated with implementing the Order, including the disclosure requirements. One commenter asserted that by failing to identify equivalent State laws, the Proposed Guidance ignored the costs of tracking and disclosing violations of potentially hundreds of additional laws and the potential costs of entering into labor compliance agreements with respect to those additional laws. Some industry commenters called for a delay of the implementation of the Order's requirements until guidance identifying the equivalent State laws is issued. NAM requested that the second guidance not be issued at all because the requirement will be "unworkable." Several employee advocates, in contrast, encouraged the Department to issue the second guidance "swiftly" before the end of 2015.

The Department has considered these comments and declines to modify the Guidance as suggested. The final Guidance reiterates that the Department will identify the equivalent State laws in addition to OSHA-approved State plans in a second guidance published in the **Federal Register** at a later date. The Department notes that the future guidance and accompanying FAR rulemaking on equivalent State laws will themselves be subject to notice and comment, and the rulemaking will address any additional economic burden resulting from the addition of equivalent State laws to the list of laws for which violations must be disclosed.

While the Department believes that contractors may incur some limited costs when adjusting compliance tracking systems to track violations of any newly-identified State laws, the Department believes such costs will be de minimis. In contrast, delaying implementation of the entirety of the Order's disclosure requirements until the subsequent rulemaking would have negative consequences on economy and efficiency of Federal contracting by allowing contractors who have unsatisfactory records of compliance with the 14 Federal labor laws identified in the Order, and OSHA-approved State Plans, to secure new contracts in the interim.

Paycheck Transparency Provisions

The final FAR rule implementing the paycheck transparency provisions specifies that contracting officers will be required to insert the paycheck transparency contract clause into covered contracts beginning on January 1, 2017. FAR 22.2007(d). This delayed effective date is included in the final Guidance.

IX. Other Comments

A. Public Availability of Disclosures and Assessment Information

Concerns about the accuracy of the information that contractors will disclose were the basis of a number of requests from commenters that the information disclosed be made publicly available. Many unions and worker-advocacy groups suggested that the information disclosed by contractors pursuant to the Order's requirements be made available in a database or Web page that is accessible to the public and easy to use. Commenters argued that making this information public will help ensure that the contractors disclose their entire legal record and interested parties are able to spot incomplete or inaccurate disclosures.[96] For some of these commenters, public disclosure requirements are essential to effective third-party involvement, which in their view is the most effective means to capture contractor misrepresentations or ongoing violations. Several commenters stated that making information publicly available is key in ensuring transparency in the process. A group of labor and employment lawyers stated that

> [r]esponsible contractors should welcome greater transparency and accountability because it will ensure that they do not face unfair competition from companies that cut corners by cheating their workers or ignoring important health-and-safety obligations.[97]

In contrast, industry commenters believed that the disclosure requirements are already too public. They suggested that protections be put in place to protect confidential and proprietary information in disclosures made by contractors pursuant to the Order's requirements. Several also suggested that any information disclosed by contractors and made publicly available should be redacted to remove any personally identifiable information. A few commenters were concerned that the release of information disclosed by contractors would have a negative effect on a contractor's business and reputation, especially if there are errors in the data presented, and as such, these commenters requested that the Department or the FAR establish a means of correcting information made publicly available.

The Department believes that the final FAR rule provides a reasonable balance between these two opposing views. The final FAR rule distinguishes between the required Labor Law decision disclosures and the optional additional relevant information that a contractor can submit to demonstrate its responsibility. The required initial representation and disclosure of limited information about each Labor Law decision is information that will be publicly available in the Federal Awardee Performance and Integrity Information System (FAPIIS). FAR 22.2004–2(b)(1)(i); *id.* 52.222–57(f). Similarly, where a contractor enters into a labor compliance agreement, the entry will be noted in FAPIIS by the ALCA and the fact that a labor compliance agreement has been agreed to will be public information. *Id.* 22.2004–2(b)(9). The optional additional information that a contractor provides, however, will only be made public if the contractor determines that it wants the information to be made public. *Id.* 22.2004–2(b)(1)(ii). The Department believes that this strikes an appropriate balance; it allows access to Labor Law decision information so that the public can assist in assuring full disclosure, while protecting more sensitive information about internal business practices.

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[95] As discussed above, the date on which the Labor Law decision was rendered—not the date of the underlying conduct—controls whether a decision must be disclosed. Therefore, even with the phase in of the disclosure requirements, a contractor may still need to disclose Labor Law decisions for which the underlying conduct occurred more than 1 year prior to the effective date of the FAR rule.

[96] Similarly, some of these commenters expressed concern that OSHA's public database of violations does not include, or does not include enough information about, violations of section 11(c) of the OSH Act. The Department notes that OSHA's database does include information about certain 11(c) cases, and it does include information from some OSHA-approved State Plans about their retaliation cases.

[97] One commenter recommended that a list of the companies undergoing responsibility reviews be published and updated by the Department. Another commenter proposed that each contracting agency track and annually report to the Department specific information regarding its contractors' compliance with the Labor Laws. However, these recommendations are beyond the Department's authority under the Order.

With regard to the comments about personally-identifiable information and other confidential information, the Department adds that information disclosed by contractors pursuant to the Order will—like any other information submitted during the procurement process—be subject to the protections of the Freedom of Information Act (FOIA) and the Privacy Act. The Department does not believe that the information submitted should be made any more or less publicly available than other information already disclosed by contractors as part of the contracting process and responsibility determinations. Although the Order's disclosure requirements may be new, the disclosed information fits into an existing process for making responsibility determinations, and the public availability of information disclosed pursuant to the Order should be the same as the public availability of information that already must be disclosed—which includes information about violations of other laws, organizational capacity, financing, and other potentially sensitive or confidential information.

B. Participation of Third-Parties

Many employee advocacy groups urged the Department to provide more specific guidance about the participation of interested third-parties in the processes required by the Order. Several of these commenters suggested that the Department provide further specificity about how third-parties should submit information about a contractor's Labor Law violations to ALCAs for consideration when assessing a contractor's record. The commenters identified parties that might provide information as: The general public, worker representatives, community groups, labor-management cooperative committees, other contractors, worker advocate groups, and others. One commenter, NABTU, warned that competitors should not be considered "stakeholders" in this process, "to avoid contractors using the responsibility determination process to undercut one another."

The Department agrees that the participation of interested third-parties is an important element of the effective implementation of the Order. The Order contemplates that information regarding Labor Law violations will be "obtained through other sources." Order, section 2(b)(ii). The Department interprets this term to include any other relevant source—including employees, worker representatives, community groups, and the public. The Department finds no reason to exclude competitors from this process. Under longstanding Federal procurement rules, "[c]ontracting officers are 'generally given wide discretion' in making responsibility determinations and in determining the amount of information that is required to make a responsibility determination." *Impresa Construzioni Geom. Domenico Garufi* v. *United States,* 238 F.3d 1324, 1334–35 (Fed. Cir. 2001) (quotations marks and citations omitted). The Department does not believe that the Order intended to limit the sources of information that contracting officers may consider—either during the preaward or postaward process.

If an interested third party has information about relevant Labor Law decisions that it believes has not been properly disclosed by a contractor, the interested party is encouraged to provide that information to the relevant ALCA. The Department will maintain a list of ALCAs, including the Department's ALCA, and their contact information on its Web site at *http://www.dol.gov/fairpayandsafeworkplaces.* Relevant third-party information can further inform ALCAs and help them perform duties such as encouraging prospective contractors with serious, repeated, willful, and/or pervasive violations to work with enforcement agencies to address compliance problems; providing input to past performance evaluations; and notifying agency suspending and debarring officials when appropriate. However, the Department notes, the amount of information given out to the public about ongoing procurements is limited and controlled, *see* Procurement Integrity Act, 41 U.S.C. Chapter 21, and therefore contracting officers cannot contact third parties during an ongoing procurement to solicit information about a prospective contractor.

Numerous worker-advocacy organizations also suggested that ALCAs and contracting officers should be required to consult with worker representatives during negotiation of a labor compliance agreement. These commenters observed that employees have direct knowledge of working conditions, and therefore that they and their representatives can provide useful input about what remedial measures would be most effective and should be included in a labor compliance agreement. One worker advocacy organization proposed that labor compliance agreements should contain a process for contracting officers to receive third-party complaints about grievances and Labor Law violations, monitoring arrangements, or labor compliance agreements. Several labor organizations commented that employees and their representatives should be able to report compliance problems to the ALCA or the Department with protections against retaliation.

The Department declines to modify the Guidance to specifically require the involvement of worker representatives in the negotiation of labor compliance agreements. As stated above, the FAR rule contemplates that enforcement agencies—not ALCAs or contracting officers—will negotiate labor compliance agreements with contractors. Therefore, the enforcement agencies will decide, based on their policies and procedures, if they will consult with or otherwise involve third parties during negotiations of labor compliance agreements.

The same is true of methods for third parties to submit information about adherence to a labor compliance agreement. As discussed above in section III(C) of this section-by-section analysis, enforcement agencies will determine the terms of each labor compliance agreement on a case-by-case basis, taking into consideration the totality of the circumstances. Many enhanced compliance agreements and suspension-and-debarment administrative agreements contain auditing, monitoring, and whistleblower protection mechanisms that are intended to encourage employees and others to provide information about adherence to the agreement. Enforcement agencies may include these types of mechanisms in labor compliance agreements, and may provide information about adherence to agreements to the relevant ALCAs. The final FAR rule requires an ALCA to consult with the Department as needed when verifying whether the contractor is meeting the terms of the agreement, *see* FAR 22.2004–3(b), through which any information that enforcement agencies have received from third parties may be provided to the ALCA. Conversely, if the ALCA has received information from third parties, he or she may provide that information to the relevant enforcement agency.

C. Anti-Retaliation and Whistleblower Protections for Reporting Information

Several employee-advocacy organizations expressed concerns that contractor employees who report Labor Law violations to ALCAs may be subject to retaliation and suggested that workers of contractors receive notice about anti-retaliation and whistleblower protections. The Northern California Basic Crafts Alliance further requested that a notice of Federal whistleblower protections be included in all documents that public officials are required to complete under the Order and its accompanying regulations. This commenter also suggested that government workers tasked with carrying out the Order be provided such notice.

The Department appreciates the serious concern raised by these commenters, but declines to make any changes to the Guidance. The Order does not provide for additional protections for whistleblowers. The Department notes, however, that Federal law already provides whistleblower protections to contractor employees who report fraud or other violations of the law related to Federal contracts. *See, e.g.*, 31 U.S.C. 3730(h) (the False Claims Act), 10 U.S.C. 2409 (protecting Department of Defense and NASA whistleblowers from retaliation). Whistleblower protection for contractor employees is also covered in FAR subpart 3.9. With regard to government employees, the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (known as the No Fear Act) requires that agencies provide annual notice to Federal employees, former Federal employees, and applicants for Federal employment of the rights and protections available under Federal antidiscrimination and whistleblower protection laws.

Guidance for Executive Order 13673, "Fair Pay Safe Workplaces"

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Introduction

The Department of Labor (the Department) issues this guidance document (the Guidance) to assist the Federal Acquisition Regulatory Council (FAR Council) and Federal agencies in the implementation of Executive Order 13673, Fair Pay and Safe Workplaces (the Order), 79 FR 45309, as amended.[98] Among other important directives, the Order provides new instructions to Federal agency contracting officers to consider a Federal contractor's compliance with 14 identified Federal labor laws and Executive orders and equivalent State laws (collectively, "Labor Laws") as a part of the determination of contractor responsibility that Federal contracting officers must undertake before awarding a contract.

The Order directed the FAR Council to issue regulations as necessary to implement the new requirements and processes. The Order also created detailed implementation roles for the Department, the Office of Management and Budget (OMB), and the General Services Administration (GSA). These agencies are implementing the Order in stages, on a prioritized basis.

The Order gives the Department several specific implementation and coordination duties. The Order directs the Secretary of Labor (the Secretary) to develop guidance to define various relevant terms, identify the State laws that are equivalent to those Federal laws covered by the Order, and specify which State wage-statement requirements are substantially similar to the Order's wage-statement requirement. The Order also directs the Secretary to develop processes for coordination between the Department and newly-designated agency labor compliance advisors (ALCA) and processes by which contracting officers and ALCAs may give appropriate consideration to determinations and agreements made by Federal enforcement agencies.

This Guidance satisfies most of the Department's responsibilities for issuing guidance, and the Department will publish at a later date a second guidance that satisfies its remaining responsibilities. The second guidance will be, as this Guidance was, submitted for notice and comment, published in the **Federal Register**, and accompanied by a proposed amendment to the FAR rule. The Department will likewise submit for notice and comment and publish any future updates to the Guidance that will have a significant effect beyond the operating procedures of the Department or that will have a significant cost or administrative impact on contractors or offerors. The Department will coordinate with the FAR Council in determining whether updates will have a significant cost or administrative impact.

This Guidance contains the following sections. Section I discusses the reasons for the Order and summarizes its requirements. Section II provides guidance about the Order's preaward disclosure requirements and defines the types of information that prime contractors and subcontractors must disclose under the Order. The Guidance defines "administrative merits determinations," "civil judgments," and "arbitral awards or decisions" (collectively, "Labor Law decisions").

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[98] Executive Order 13673 was amended by Executive Order 13683, December 11, 2014 (79 FR 75041, December 16, 2014) and Executive Order __ __ (FR ____, [DATE]). This document provides guidance for the Order as amended.

Section III explains how ALCAs should assess Labor Law violations and provide advice and analysis to contracting officers during the preaward process. The first part of section III deals with how ALCAs should classify violations, and it defines the classification terms "serious," "repeated," "willful," and "pervasive" for purposes of the Order. The second part of section III explains how ALCAs should weigh a contractor's violations, including any potential mitigating factors and factors that weigh against a recommendation that the contractor has a satisfactory record of Labor Law compliance. The third part explains the process in the FAR rule for the ALCA to provide advice and analysis to the contracting officer about a contractor's record of Labor Law compliance, including whether negotiation of a labor compliance agreement is warranted.

Section IV provides guidance on the disclosure and assessment process during the postaward period. Section V summarizes the process under the Order for determining subcontractor responsibility. Section VI sets out the Department's preassessment process to help contractors come into compliance before the contractor bids on a solicitation. Section VII provides guidance on the Order's paycheck transparency provisions. Section VIII discusses the effective date and phase-in of the Order's requirements, including the phase-in of the Order's requirement for disclosure of violations of equivalent State laws.

I. Purpose and Summary of the Order

The Order states that the Federal Government will promote economy and efficiency in procurement by contracting with responsible sources that comply with labor laws. *See* Order, section 1. The Order seeks to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by ensuring that they understand and comply with labor laws. *See id.*

Beyond their human costs, labor law violations create risks to the timely, predictable, and satisfactory delivery of goods and services to the Federal Government, and Federal agencies risk poor performance by awarding contracts to companies with histories of labor law violations. Poor workplace conditions lead to lower productivity and creativity, increased workplace disruptions, and increased workforce turnover. For contracting agencies, this means receipt of lower quality products and services and increased risk of project delays and cost overruns.

Contracting agencies can reduce execution delays and avoid other complications by contracting with contractors with track records of labor law compliance—and by helping to bring contractors with past violations into compliance. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and to deliver goods and services to the Federal Government in a timely, predictable, and satisfactory fashion.

Moreover, contractors who invest in their workers' safety and maintain a fair and equitable workplace should not have to compete with contractors who offer lower bids—based on savings from skirting labor laws—and then ultimately deliver poor performance to taxpayers. By contracting with employers who are in compliance with labor laws, the Federal Government can ensure that taxpayers' money supports jobs in which workers have safe workplaces, receive the family leave to which they are entitled, get paid the wages they have earned, and do not face unlawful workplace discrimination.

A. Statutory Requirements for Contracting With Responsible Sources

By statute, contracting agencies are required to award contracts to responsible sources only. *See* 10 U.S.C. 2305(b); 41 U.S.C. 3702(b), 3703. A "responsible source" means a prospective contractor that, among other things, "has a satisfactory record of integrity and business ethics." 41 U.S.C. 113(4). Part 9 of the Federal Acquisition Regulation (FAR) implements this statutory "responsibility" requirement. The FAR states that "[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only." FAR 9.103(a).[99] In accordance with the statutory definition of "responsible source," the FAR states that "[t]o be determined responsible, a prospective contractor must . . . [h]ave a satisfactory record of integrity and business ethics . . . ." FAR 9.104–1(d). Thus, for every procurement contract, an agency contracting officer must consider whether a contractor has a satisfactory record of integrity and business ethics and then make an affirmative determination of responsibility—that the awardee is a responsible source.

B. Legal Authority

The President issued the Order pursuant to his authority under "the Constitution and the laws of the United States," expressly including the Federal Property and Administrative Services Act (the Procurement Act), 40 U.S.C. 101 *et seq.* The Procurement Act authorizes the President to "prescribe policies and directives that the President considers necessary to carry out" the statutory purposes of ensuring "economical and efficient" government procurement and administration of government property. 40 U.S.C. 101, 121(a). The Order establishes that the President considers the requirements included in the Order to be necessary to economy and efficiency in Federal contracting. *See* Order, section 1.

The Order directs the Secretary to define certain terms used in the Order and to develop guidance "to assist agencies" in implementing the Order's requirements. Order, sections 2(a)(i), 4(b). The Guidance does not bind private parties or agency officials. Rather, the Order directs the FAR Council to issue the regulations necessary to implement the new requirements and processes. It is the Order and the FAR Council regulations that bind prospective contractors, subcontractors, contracting officers, and other agency officials—not the Guidance. The Guidance is not a regulation, and it does not amend or supersede the Order or the FAR. Where the Guidance uses mandatory language such as "shall," "must," "required," or "requirement," it does so only to describe the Department's interpretation of the regulatory requirements in the FAR.

C. Summary of the Order's Requirements and Interaction With Existing Requirements

The Order builds on the pre-existing procurement system by instructing Federal agency contracting officers to consider a contractor's Labor Law violations, if any, as a factor in determining if the contractor has a satisfactory record of integrity and business ethics and may therefore be found to be a responsible source eligible for a contract award. *See* Order, section 2(a)(ii) and (iii). The Order's requirements are implemented through Part 22 of the FAR, which requires Federal agencies to include certain contract clauses in covered contracts.

To facilitate the responsibility determination, the Order provides that, for all covered procurement contracts (defined below in section II(A)), each agency must require that the contractor make an initial representation regarding whether there have been any Labor Law decisions rendered against the contractor within the preceding 3-year period for violations of the 14 identified Labor Laws. *See* Order, section 2(a)(i); Guidance, section II (Preaward disclosure requirements).

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[99] The FAR can be found at title 48 of the Code of Federal Regulations. Citations in this Guidance to the FAR use format FAR [section] instead of 48 CFR [section].

The 14 Federal labor laws or Executive orders identified in the Order are:

- The Fair Labor Standards Act (FLSA);
- the Occupational Safety and Health Act of 1970 (OSH Act);
- the Migrant and Seasonal Agricultural Worker Protection Act (MSPA);
- the National Labor Relations Act (NLRA);
- 40 U.S.C. chapter 31, subchapter IV, also known as the Davis-Bacon Act (DBA);
- 41 U.S.C. chapter 67, also known as the Service Contract Act (SCA);
- Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity);
- section 503 of the Rehabilitation Act of 1973;
- the Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974;
- the Family and Medical Leave Act (FMLA);
- title VII of the Civil Rights Act of 1964 (Title VII);
- the Americans with Disabilities Act of 1990 (ADA);
- the Age Discrimination in Employment Act of 1967 (ADEA); and
- Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors).

Prior to an award, as a part of the responsibility determination, contractors with Labor Law decisions to disclose must make an additional disclosure of information about each violation. *See* FAR 22.2004–1(a). In addition, contracting officers must provide contractors with an opportunity to disclose any steps taken to correct any disclosed violations or improve compliance with the Labor Laws, including any agreements entered into with an enforcement agency. *See* Order, section 2(a)(ii); Guidance, section II(C)(3). Contracting officers, in consultation with the relevant ALCA, then must consider the information in determining if a contractor is a responsible source with a satisfactory record of integrity and business ethics. *See* Order, section 2(a)(iii); Guidance, section III (Preaward assessment and advice). ALCAs provide advice and analysis to the contracting officer about the contractor's record of Labor Law compliance, including in some cases a recommendation that the contractor needs to enter into an agreement to implement appropriate remedial measures or other actions to avoid further violations (a labor compliance agreement) or a recommendation that the agency suspending and debarring official should be notified. *See* FAR 22.2004–2(b).

Similar requirements apply to subcontractors. *See* Order, section 2(a)(iv); FAR 52.222–59(c); Guidance, section V (Subcontractor responsibility). Contractors are bound by the contract clause in their Federal award to require subcontractors on covered subcontracts to disclose any Labor Law decisions rendered against the subcontractor within the preceding 3-year period. *See* FAR 52.222–59(c)(3). A subcontractor with Labor Law decisions to disclose is required to make this disclosure to the Department, which provides the subcontractor with advice regarding its record of Labor Law compliance. *See* FAR 52.222–59(c)(3)(ii), (c)(4)(ii)(C); [Amended Order]. The subcontractor then must provide the Department's advice to the contractor, which will use that advice in determining whether the subcontractor is a responsible source. *See* FAR 52.222–59(c)(4)(ii)(C). The contractor will (in most cases, before awarding the subcontract) consider the advice from the Department in determining whether the subcontractor is a responsible source that has a satisfactory record of integrity and business ethics. *See id.* 52.222–59(c)(2).

The Order's disclosure requirement continues after an award is made. Semiannually during the performance of the contract, contractors must update the information provided about their own Labor Law violations and obtain the required information for covered subcontracts. *See* Order, section 2(b)(i); Guidance, section VI (Postaward disclosure updates and assessment of Labor Law violations). If a contractor discloses information regarding Labor Law violations during contract performance, or similar information is obtained through other sources, the contracting officer, in consultation with the ALCA, considers whether action is necessary. *See* Order, section 2(b)(ii). Such action may include requiring the contractor to enter into a labor compliance agreement, declining to exercise an option on a contract, terminating the contract in accordance with relevant FAR provisions, or referring the contractor to the agency suspending and debarring official. *See id.* If information regarding Labor Law decisions rendered against a contractor's subcontractor is brought to the attention of the contractor, then the contractor shall similarly consider whether action is necessary with respect to the subcontractor. *See id.* section 2(b)(iii).

The Order requires each contracting agency to designate a senior agency official to be an ALCA to provide consistent guidance to contracting officers. *See* Order, section 3. In consultation with the Department and other agencies responsible for enforcing the Labor Laws, ALCAs help contracting officers to: Review information regarding Labor Law decisions disclosed by contractors; assess whether disclosed violations are serious, repeated, willful, or pervasive; review the contractor's remediation of the violation and any other mitigating factors; and determine if the violations identified warrant remedial measures, such as a labor compliance agreement. *See id.* section 3(d); FAR 22.2004–1(c)(3).

The Order also contains two paycheck transparency requirements. *See* Order, section 5; Guidance, section VII (Paycheck transparency). First, the Order requires contractors to provide all individuals performing work under the contract for whom they are required to maintain wage records under the FLSA, DBA, SCA, or equivalent State laws with a wage statement that contains information concerning that individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay. *See* Order, section 5(a). The Order instructs that the wage statement for individuals who are exempt from the overtime compensation requirements of the FLSA need not include a record of hours worked if the contractor informs the individuals of their exempt status. *See id.* Contractors can satisfy the Order's wage-statement requirement by providing a wage statement that complies with an applicable State or local wage-statement requirement that the Secretary has determined is substantially similar to the Order's wage-statement requirement. *See id.* Second, the Order provides that if a contractor is treating an individual performing work under a covered contract as an independent contractor, and not an employee, the contractor must provide a document informing the individual of this status. *See id.* section 5(b). The Order and the implementing FAR contract clause require contractors to incorporate these same two paycheck transparency requirements into covered subcontracts. *See id.* sections 5(a)–(b); FAR 52.222–60.[100]

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[100] The Order further requires contracting agencies to ensure that for all contracts where the estimated value of the supplies acquired and services required exceeds $1 million, provisions in solicitations and clauses in contracts shall provide that contractors agree that the decision to arbitrate

Finally, the Order requires that, in developing the Guidance and proposing to amend the FAR, the Secretary and the FAR Council minimize, to the extent practicable, the burden of complying with the Order for Federal contractors and subcontractors and in particular for small entities, including small businesses and small nonprofit organizations. *See* Order, section 4(e). The intent of the Order is to minimize additional compliance burdens and to increase economy and efficiency in Federal contracting by helping more contractors and subcontractors come into compliance with workplace protections, not by denying them contracts. Toward that end, the Order provides that ALCAs and the Department will be available for consultation with contractors regarding the Order's requirements, *see* Order, sections 2(a)(vi), 2(b)(iii), 3(c), and that contracting officers (and contractors for their subcontractors) will take into account any remedial actions and other mitigating factors when making a responsibility determination.

II. Preaward Disclosure Requirements

This section of the Guidance discusses who must disclose Labor Laws decisions during the preaward period, what types of Labor Law decisions must be disclosed, and what particular categories of information must be disclosed for each decision. This section of the Guidance also defines the meaning of the different types of Labor Law decisions: "administrative merits determination," "civil judgment," and "arbitral award or decision."

During the preaward process, the Order requires contracting agencies to include provisions in solicitations for all covered procurement contracts (defined below) that will require prospective contractors to disclose certain information about Labor Law violations. *See* Order, section 2(a). The solicitation provisions require all prospective contractors bidding on covered contracts to make an initial representation regarding whether there have been any Labor Law decisions rendered against them within the preceding 3 years. *See* FAR 22.2004–1(a) and 22.2007(a); FAR 52.222–57; FAR 52.212–3(s) (commercial items). Later, only a subset of these prospective contractors—those for whom a responsibility determination is being performed—must make a more detailed disclosure about each Labor Law decision. *See id.* 22.2004–1(a). These disclosure requirements are phased in during the first year of the Order's effect. Section VIII below contains a description of the phases of implementation.

The Order and the final FAR rule also contain requirements for postaward disclosure, *see* Order, section 2(b); FAR 22.2004–1(a), and for disclosure by subcontractors, *see* Order, section 2(a)(iv); FAR 22.2004–1(b) and 52.222–58. These requirements are discussed below in sections IV and V, respectively.

A. Covered Contracts

The Order applies to contracting activities by executive agencies. *See* Order, section 1. The term "executive agency" is defined under the FAR as "an executive department, a military department, or any independent establishment within the meaning of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101." FAR 2.101. This Guidance generally uses the term "contracting agencies" to refer to executive agencies that are engaged in contracting.

The Order requires prime contractors to make disclosures for procurement contracts with contracting agencies for goods and services, including construction, only where the estimated value of the supplies acquired and services required exceeds $500,000.[101] *See* Order, section 2(a)(i). For purposes of this Guidance, these contracts are referred to as "covered procurement contracts." As used in this Guidance, the term "contract" has the same meaning as it has under the FAR. *See* FAR 2.101. Thus, the term "contract" means a procurement contract and does not include grants and cooperative agreements (which are not subject to the Order's requirements).

The Order and the FAR rule also apply to certain subcontracts. The definition of covered subcontracts and the specific disclosure rules associated with subcontractors are discussed in detail in section V of this Guidance. This Guidance uses the term "covered contracts" to include both covered procurement contracts and covered subcontracts.

The Order's disclosure requirements apply to contracts and subcontracts for commercial items that otherwise satisfy the Order's criteria. *See* FAR 52.212–3(s); 52.244–6. The coverage for commercially available off-the-shelf (COTS) items is more limited: Contracts for COTS items are covered procurement contracts if they otherwise satisfy the Order's criteria, but subcontracts for COTS items are not covered by the Order and therefore are not covered subcontracts. *See id.* FAR 22–2004–1(b) (exempting only subcontracts for COTS items).

In this Guidance, references to "contractors" include entities that hold covered procurement contracts as well as prospective contractors, or "offerors," meaning any entity that bids for a covered procurement contract. Similarly, references to "subcontractors" include entities that hold covered subcontracts as well as prospective subcontractors, or "offerors," meaning any entity that bids for a covered subcontract. The term "entity" is properly understood to include both organizations and individuals that apply for and receive covered contracts.

B. Labor Law Decisions

The Order creates disclosure requirements for contractors and subcontractors performing or bidding on covered contracts. Under the Order, contractors and subcontractors must disclose Labor Law decisions that have been "rendered against [them] within the preceding 3-year period." *See* Order, sections 2(a)(i), 2(a)(iv)(A).

The 3-Year Disclosure Period

The FAR provides for a phase-in of the 3-year disclosure period prior to October 25, 2018. Accordingly, the contract clauses require disclosure of Labor Law decisions rendered against the offeror "during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter." FAR 52.222–57(c) (covering contractor disclosures); 52.222–58(b) (covering subcontractor disclosures). The phase-in is also discussed below in section VIII of this Guidance.

The "preceding 3-year period" refers to the 3 years preceding the date of the offer (*i.e.,* the contract bid or proposal). Contractors and subcontractors must disclose Labor Law decisions rendered during this 3-year disclosure period even if the underlying conduct that violated the Labor Laws occurred more than 3 years prior to the date of the

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claims arising under Title VII or any tort related to or arising out of sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after such disputes arise, subject to certain exceptions. *See* Order, section 6. Contracting agencies must require contractors to incorporate this same requirement into subcontracts where the estimated value of the supplies acquired and services required exceeds $1 million, subject to certain exceptions. *See id.* This Guidance does not address this arbitration requirement.

[101] *See* FAR 1.108(c) (explaining computation of dollar thresholds under the FAR).

disclosure. For example, if an employer failed to pay overtime due to workers in 2014, and the Department's Wage and Hour Division (WHD) makes a determination in 2016 that the employer violated the FLSA, then the employer must disclose the FLSA determination when bidding on a contract in 2018, even though the conduct underlying the violation occurred more than 3 years prior to the date of the employer's bid.

Additionally, contractors and subcontractors must disclose Labor Law decisions whether or not the underlying conduct occurred in the performance of work on a covered contract. Accordingly, a contractor or subcontractor must disclose a Labor Law decision even if it was not performing or bidding on a covered contract at the time. For example, if the Department's Occupational Safety and Health Administration (OSHA) determines that an employer violated a safety standard and the employer later (within 3 years of the determination) bids for the first time on a covered contract, the employer must disclose the OSHA citation even though it was not a contractor or bidding on a covered contract at the time when it received the determination.

Covered Labor Laws and Equivalent State Laws

Labor Law decisions that must be disclosed include those issued for violations of the 14 Federal laws and Executive orders specified in the Order. These laws are listed in section 2 of the Order and the list is included above in section I(C) of this Guidance. In addition, contractors and subcontractors must disclose violations of State laws that the Department identifies as equivalent to those 14 Federal laws. *See* Order, section 2(a)(i)(O).

The Department has determined that OSHA-approved State Plans are equivalent State laws for the purposes of the Order. The OSH Act permits certain States to administer OSHA-approved State occupational safety-and-health plans in lieu of Federal enforcement of the OSH Act. Section 18 of the OSH Act encourages States to develop and operate their own job safety-and-health programs, and OSHA approves and monitors State Plans and provides up to 50 percent of an approved plan's operating costs. OSHA-approved State Plans are described and listed in 29 CFR part 1952, and further information about such plans can be found at *https://www.osha.gov/dcsp/osp/index.html.* Labor Law decisions finding violations under an OSHA-approved State Plan are therefore subject to the Order's disclosure requirements.

In future guidance, the Department will identify additional equivalent State laws. Until this subsequent guidance and a subsequent FAR amendment are published, contractors and subcontractors are not required to disclose violations of State laws other than the OSHA-approved State Plans.

1. Defining "Administrative Merits Determination"

Enforcement agencies issue notices, findings, and other documents when they determine that any of the Labor Laws have been violated. For purposes of this Guidance, "enforcement agency" means any agency that administers the Federal Labor Laws: The Department and its agencies—OSHA, WHD, and the Office of Federal Contract Compliance Programs (OFCCP); and the Occupational Safety and Health Review Commission (OSHRC).[102] Enforcement agencies also include the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB). "Enforcement agency" does not include a Federal agency that, in its capacity as a contracting agency, undertakes an investigation of a violation of the Federal Labor Laws.[103] For purposes of this Guidance, "enforcement agency" also includes a State agency designated to administer an OSHA-approved State Plan, but only to the extent that the State agency is acting in its capacity as administrator of such plan. And once the Department's second guidance (to be published at a later date) identifying the State laws that are equivalent to the Federal Labor Laws is finalized, and a corresponding FAR amendment is published, "enforcement agency" will also include any State agency that enforces those identified equivalent State laws.

For purposes of the Order, the term "administrative merits determination" means any of the following notices or findings—whether final or subject to appeal or further review—issued by an enforcement agency following an investigation that indicates that the contractor or subcontractor violated any provision of the Labor Laws:

(a) From the Department's Wage and Hour Division:

- A WH–56 "Summary of Unpaid Wages" form;
- a letter indicating that an investigation disclosed a violation of the FLSA or a violation of the FMLA, SCA, DBA, or Executive Order 13658;
- a WH–103 "Employment of Minors Contrary to The Fair Labor Standards Act" notice;
- a letter, notice, or other document assessing civil monetary penalties;
- a letter that recites violations concerning the payment of subminimum wages to workers with disabilities under section 14(c) of the FLSA or revokes a certificate that authorized the payment of subminimum wages;
- a WH–561 "Citation and Notification of Penalty" for violations under the OSH Act's field sanitation or temporary labor camp standards;
- an order of reference filed with an administrative law judge.

(b) from the Department's Occupational Safety and Health Administration or any State agency designated to administer an OSHA-approved State Plan:

- A citation;
- an imminent danger notice;
- a notice of failure to abate; or
- any State equivalent;

(c) from the Department's Office of Federal Contract Compliance Programs:

- A show cause notice for failure to comply with the requirements of Executive Order 11246, section 503 of the Rehabilitation Act, the Vietnam Era Veterans' Readjustment Assistance Act of 1972, or the Vietnam Era Veterans' Readjustment Assistance Act of 1974;

(d) from the Equal Employment Opportunity Commission:

- A letter of determination that reasonable cause exists to believe that an unlawful employment practice has occurred or is occurring;

(e) from the National Labor Relations Board:

- A complaint issued by any Regional Director;

(f) a complaint filed by or on behalf of an enforcement agency with a Federal or State court, an administrative law judge or other administrative judge alleging that the contractor or subcontractor violated any provision of the Labor Laws; or

(g) any order or finding from any administrative law judge or other administrative judge, the Department's Administrative Review Board, the Occupational Safety and Health Review Commission or State equivalent, or the National Labor Relations Board that the contractor or subcontractor violated any provision of the Labor Laws.

The above definition provides seven categories of documents, notices, and findings from enforcement agencies that constitute the administrative merits determinations that must be disclosed under the Order. The list is an exhaustive one, meaning that if a document does not fall within one of categories (a) through (g) above, the Department does not consider it to be an "administrative merits determination" for purposes of the Order.

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[102] OSHRC is an independent Federal agency that provides administrative trial and appellate review in contests of OSH Act citations or penalties.

[103] For example, contracting agencies may investigate violations of the DBA relating to contracts that they administer, but that does not make them enforcement agencies for purposes of the Order.

In addition, the Department will publish at a later date a second proposed guidance that identifies an eighth category of administrative merits determinations: The documents, notices, and findings issued by State enforcement agencies when they find violations of the State laws equivalent to the Federal Labor Laws.

Categories (a) through (e) in the definition list types of administrative merits determinations that are issued by specific enforcement agencies. Categories (f) and (g) describe types of administrative merits determinations that are common to multiple enforcement agencies. Category (f) is necessary because it is possible that an enforcement agency will not have issued a notice or finding following its investigation that falls within categories (a) through (e) prior to filing a complaint in court.

Administrative merits determinations are issued following an investigation by the relevant enforcement agency. Administrative merits determinations are not limited to notices and findings issued following adversarial or adjudicative proceedings such as a hearing, nor are they limited to notices and findings that are final and unappealable. Thus, an administrative merits determination still must be disclosed under the Order even if the contractor is challenging it or can still challenge it. The Department recognizes that contractors may dispute an administrative merits determination. As set forth below, when contractors disclose administrative merits determinations, they may also submit any additional information that they believe may be helpful in assessing the violations at issue (including the fact that the determination has been challenged). Additionally, contractors have the opportunity to provide information regarding any mitigating factors. This information will be carefully considered. See below section III(B).

Certain "complaints" issued by enforcement agencies are included in the definition of "administrative merits determination." The complaints issued by enforcement agencies included in the definition are not akin to complaints filed by private parties to initiate lawsuits in Federal or State courts. Each complaint included in the definition represents a finding by an enforcement agency following a full investigation that a Labor Law was violated; in contrast, a complaint filed by a private party in a Federal or State court represents allegations made by that plaintiff and not any enforcement agency. Employee complaints made to enforcement agencies (such as a complaint for failure to pay overtime wages filed with WHD or a charge of discrimination filed with the EEOC) are not administrative merits determinations.

2. Defining "Civil Judgment"

For purposes of the Order, the term "civil judgment" means any judgment or order entered by any Federal or State court in which the court determined that the contractor violated any provision of the Labor Laws, or enjoined or restrained the contractor from violating any provision of the Labor Laws. Civil judgment includes a judgment or order that is not final or is subject to appeal.

A civil judgment could be the result of an action filed in court by or on behalf of an enforcement agency or, for those Labor Laws that establish a private right of action, by a private party or parties. The judgment or order in which the court determined that a violation occurred may be the result of a jury trial, a bench trial, or a motion for judgment as a matter of law, such as a summary judgment motion. Even a decision granting partial summary judgment may be a civil judgment if, for example, the decision finds a violation of the Labor Laws but leaves resolution of the amount of damages for later in the proceedings. Likewise, a preliminary injunction (but not a temporary restraining order) can be a civil judgment if the order enjoins or restrains a violation of the Labor Laws. Civil judgments include consent judgments and default judgments to the extent that there is a determination in the judgment that any of the Labor Laws have been violated, or the judgment enjoins or restrains the contractor from violating any provision of the Labor Laws. A private settlement where the lawsuit is dismissed by the court without any judgment being entered is not a civil judgment. An accepted offer of judgment pursuant to the Federal Rule of Civil Procedure 68 is also not a civil judgment for the purposes of the Order.

Civil judgments do not include judgments or orders issued by an administrative law judge or other administrative tribunals, such as those identified in the definition of administrative merits determination. Such judgments and orders may be administrative merits determinations. If, however, a Federal or State court issues a judgment or order affirming an administrative merits determination, then the court's decision is a civil judgment.

Civil judgments include a judgment or order finding that a contractor violated any of the Labor Laws even if the order or decision is subject to further review in the same proceeding, is not final, can be appealed, or has been appealed. As set forth below, when contractors disclose civil judgments, they may also submit any additional information that they believe may be helpful in assessing the violations at issue—including the fact that the civil judgment has been appealed. Additionally, contractors have the opportunity to provide information regarding any mitigating factors.

3. Defining "Arbitral Award or Decision"

For purposes of the Order, the term "arbitral award or decision" means any award or order by an arbitrator or arbitral panel in which the arbitrator or arbitral panel determined that the contractor violated any provision of the Labor Laws, or enjoined or restrained the contractor from violating any provision of the Labor Laws. Arbitral award or decision includes an arbitral award or decision regardless of whether it is issued by one arbitrator or a panel of arbitrators and even if the arbitral proceedings were private or confidential.

Arbitral award or decision also includes an arbitral award or decision finding that a contractor violated any of the Labor Laws even if the award or decision is subject to further review in the same proceeding, is not final, or is subject to being confirmed, modified, or vacated by a court. As set forth below, when contractors disclose arbitral awards or decisions, they may also submit any additional information that they believe may be helpful in assessing the violations at issue (including the fact that they have sought to have the award or decision vacated or modified). Additionally, contractors have the opportunity to provide information regarding any mitigating factors.

4. Successive Labor Law Decisions Arising From the Same Underlying Violation

If a contractor appeals or challenges a Labor Law decision, there may be successive decisions that arise from the same underlying violation. For example, if a contractor receives an OSHA citation and appeals that citation, it may receive an order from an administrative law judge (ALJ) upholding or vacating that citation. Similarly, if a contractor receives an adverse decision from the Department's Administrative Review Board (ARB) and challenges the decision in Federal court, it may receive a court judgment concerning that decision.

Whether successive Labor Law decisions must be disclosed depends on the nature of the most recent decision at the time of disclosure. Where the most recent Labor Law decision finds no violation—or otherwise reverses or vacates all prior findings of a violation—then the contractor does not need to disclose any of the decisions. Where the most recent decision has reinstated an initial finding of a violation, however, then the latest decision reinstating the finding must be disclosed. Thus, in the first example above, if the ALJ reverses the OSHA citation, the contractor need not disclose either the initial citation or the ALJ's order. But if the violation is later reinstated by the full OSHRC or by a Federal court of appeals, the contractor must disclose the OSHRC or appellate court decision.

Where the most recent Labor Law decision upholds or affirms any finding of violation, the contractor should disclose only the Labor Law decision that is the most recent at the time of disclosure. Thus, in the second example above, if the Federal court affirms the ARB's decision, or modifies it but does not vacate it in its entirety, the contractor should disclose the more recent court order and need not disclose the original ARB decision.

Where the most recent Labor Law decision does not affirm or vacate the violation, but instead remands it for further proceedings, the underlying violation must still be disclosed. For example, an ALJ may grant a pre-trial motion for summary decision upholding an OSHA citation, and then OSHRC may reverse the ALJ decision and remand it because the OSHRC believes that a full trial was necessary to determine whether to uphold the citation. In that case, the OSHRC has not completely reversed or vacated the original OSHA citation, so the contractor still must disclose the original OSHA citation.

Similarly, if the contractor appeals or challenges only part of a Labor Law decision, the contractor should continue to disclose the original Labor Law decision even if a successive Labor Law decision has been issued. For example, if, within the preceding 3-year period, a district court finds a contractor liable for Title VII and FLSA violations, and the contractor appeals only the Title VII judgment to the court of appeals, it must continue to disclose the district court decision (containing the finding of an FLSA violation) even if a subsequent court of appeals decision vacates the Title VII violation.

If the contractor disclosed a Labor Law decision before being awarded a covered contract, and a successive decision arising from the same underlying violation is rendered during the performance of the contract and affirms that the contractor committed the violation, the successive decision is a Labor Law decision within the meaning of this Guidance. Therefore, the contractor must disclose the most recent decision when it updates its disclosures during performance of the contract. *See* FAR 22.2004–3(a).

C. Information That Must Be Disclosed

The following sections provide guidance on the information that must be disclosed during the preaward stage of the contracting process. Section 22.2004 of the FAR sets forth the specific requirements for what must be disclosed at each stage, and how such information is to be reported. The process by which subcontractors make disclosures is discussed in section V(A) below.

1. Initial Representation

When a contractor bids on a solicitation for a covered procurement contract, it must disclose whether any Labor Law decisions have been rendered against it "during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter." FAR 52.222–57(c). At this stage, the contractor must represent to the best of its knowledge and belief whether it has or has not had such a decision rendered against it, without providing further information. *See* FAR 52.222–57(c).

2. Required Disclosures

If a contractor reaches the stage in the process at which a responsibility determination is initiated, and that contractor responded affirmatively at the initial representation stage, the contracting officer will require additional information about that contractor's Labor Law violation(s). *See* FAR 52.222–57(d)(1).[104] For each administrative merits determination, civil judgment, or arbitral award or decision that must be disclosed, the contractor must provide:

- The Labor Law that was violated;
- the case number, inspection number, charge number, docket number, or other unique identification number;
- the date that the determination, judgment, award, or decision was rendered; and
- the name of the court, arbitrator(s), agency, board, or commission that rendered it.

See FAR 52.222–57(d)(1)(i). The contractor must disclose this information in the System for Award Management (SAM) unless an exception from SAM registration applies. *See* FAR 22.2004–2(b)(1)(i), (iii).

With regard to the second element of information listed above, the contractor should provide the inspection number for OSH Act citations, the case number for NLRB proceedings, the charge number for EEOC proceedings, the investigation or case number for WHD investigations, the case number for investigations by OFCCP, the case number for determinations by administrative tribunals, and the case number for court proceedings.

3. Opportunity To Provide Additional Relevant Information, Including Mitigating Factors

The contractor may also provide additional information that it believes will demonstrate its responsibility. *See* FAR 52.222–57(d)(1)(iii). The contractor must disclose this additional information in SAM unless an exception from SAM registration applies. *See id.* 22.2004–2(b)(1)(i) and (iii), 52.222–57(d)(1)(iv). The additional information may include mitigating factors and remedial measures, such as information about steps taken to correct the violations at issue, the negotiation or execution of a settlement agreement or labor compliance agreement, or other steps taken to achieve compliance with the Labor Laws. *See id.* 22.2004–2(b)(1)(ii). The contractor may also provide any other information that they believe may be relevant, including that it is challenging or appealing an adverse Labor Law decision. The information that the contractor submits will be carefully considered during an ALCA's assessment of the contractor's record of compliance.

The additional relevant information provided by the contractor will not be made public unless the contractor determines that it wants the information to be made public. *Id.* 22.2004–2(b)(1)(ii). However, where a contractor enters into a labor compliance agreement, the entry will be noted in the Federal Awardee Performance and Integrity Information System (FAPIIS), available at *www.fapiis.gov/*, by the ALCA and the fact that a labor compliance agreement has been agreed to will be public information. *Id.* 22.2004–2(b)(9).

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[104] In addition to the information that the Order instructs the contracting officer to request, contracting officers also have a general duty to obtain such additional information as may be necessary to be satisfied that a prospective contractor has a satisfactory record of integrity and business ethics. *See* FAR 9.105–1(a).

Mitigating circumstances are discussed in more depth below in section III(B)(1) and labor compliance agreements are discussed in section III(C).

4. Preaward Updates to Representations

Contractors have a duty to provide an update to the contracting officer prior to the date of an award if the contractor's initial representation is no longer accurate. In some procurements, a period of time may pass between the date of the contractor's offer on the contract and the date of the award. If, during this time, a new Labor Law decision is rendered or the contractor otherwise learns that its representation is no longer accurate, the contractor must notify the contracting officer of an update to its representation. *See* FAR 52.222–57(e). This means that if the contractor made an initial representation that it had no Labor Law decisions to disclose, and since the time of the offer a new decision is rendered, the contractor must notify the contracting officer. The reverse is also true: If, for example, an offeror made an initial representation that it has a Labor Law decision to disclose, and since the time of the offer that Labor Law decision has been vacated by the enforcement agency or a court, the contractor must notify the contracting officer.

III. Preaward Assessment and Advice

For every procurement contract, the agency's contracting officer must consider whether a contractor has a satisfactory record of integrity and business ethics and then make an affirmative determination of responsibility before making the award. The contracting officer considers relevant responsibility-related information from a number of sources, including members of the procurement team who are subject-area experts. In determining whether the contractor's history of Labor Law compliance reflects a satisfactory record of integrity and business ethics, the contracting officer considers the analysis and advice provided by the ALCA, using this section of the Guidance, as required by the Order and the implementing FAR rule. As discussed in section V(A) below, contractors will make the same determination for each of their subcontractors performing a covered subcontract, considering analysis and advice provided by the Department regarding any Labor Law decisions disclosed by the subcontractor.

This section of the Guidance explains the three-step process by which ALCAs assess a contractor's record of Labor Law compliance and provide preaward advice to contracting officers. Section III(A) explains the first step: Classifying the Labor Law violations. At this stage, an ALCA reviews all of the contractor's violations to determine if any are "serious," "repeated," "willful," or "pervasive." Section III(B) discusses the second step: Weighing the Labor Law violations. At this point, the ALCA analyzes any serious, repeated, willful, and/or pervasive violations in light of the totality of the circumstances, including any mitigating factors that are present. Section III(C) discusses the third step: The ALCA provides advice to the contracting officer regarding the contractor's record of Labor Law compliance and whether a labor compliance agreement or other action is warranted.

In the first step of the assessment process, the "classification" step, an ALCA reviews each of the contractor's Labor Law violations to determine which, if any, are serious, repeated, willful, and/or pervasive. Section III(A) of the Guidance defines these four terms. All violations of Federal laws are a serious matter; but, for purposes of the Order, certain Labor Law violations are classified as serious, repeated, willful, and/or pervasive. As explained below, the classification of a violation as serious, repeated, willful, and/or pervasive does not automatically result in a finding that a contractor lacks integrity and business ethics. Rather, this subset of all Labor Law violations represents those that may bear on an assessment of a contractor's integrity and business ethics; violations that fall outside this subset are less likely to have a significant impact. Thus, although the Order requires contractors to disclose all Labor Law decisions from the relevant time period, only those decisions involving violations classified as serious, repeated, willful, and/or pervasive are considered as part of the weighing step and factor into the ALCA's written analysis and advice.

In the second step of the assessment process, the "weighing" step, the ALCA analyzes the contractor's serious, repeated, willful, and/or pervasive violations of Labor Laws in light of the totality of the circumstances, including, among other factors, the severity of the violation(s), the size of the contractor, and any mitigating factors. During the assessment process, the ALCA considers whether the contractor has a satisfactory record of Labor Law compliance—in other words, whether the contractor's history of Labor Law compliance and any adoption by the contractor of preventative compliance measures indicate that the contracting officer could find the contractor to have a satisfactory record of integrity and business ethics despite the violations. The contractor's timely remediation of violations of Labor Laws is generally the most important factor weighing in favor of a conclusion that a contractor has a satisfactory record of Labor Law compliance. The ALCA also considers factors that weigh against a conclusion that the contractor has a satisfactory record. For example, as explained more fully below, pervasive violations and violations of particular gravity, among others, may support such a conclusion. *See* Section III(B).

In the third step of the assessment process, the ALCA provides written advice and analysis to the contracting officer regarding the contractor's record of Labor Law compliance. The ALCA recommends whether the contractor's record supports a finding of a satisfactory record of integrity and business ethics. In cases where the ALCA concludes that a contractor has an unsatisfactory record of Labor Law compliance, the ALCA will recommend the negotiation of a labor compliance agreement or other appropriate action such as notification of the agency suspending and debarring official. If the ALCA concludes that a labor compliance agreement is warranted, the ALCA will recommend whether the agreement should be negotiated before or after the award. The written analysis supporting the advice describes the ALCA's classification and weighing of the contractor's Labor Law violations and includes the rationale for the recommendation. *See* Section III(C).

While the ALCA provides written analysis and advice, the contracting officer has the ultimate responsibility and discretion to determine whether the contractor has a satisfactory record of integrity and business ethics and is a responsible source. *See* FAR 22.2004–2(b)(4).

A. Classifying Labor Law Violations

In the first step of the preaward assessment and advice process, the ALCA reviews all of the contractor's violations to determine if any should be classified as "serious," "repeated," "willful," and/or "pervasive." As part of this process, the ALCA monitors SAM and FAPIIS for new and updated contractor disclosures of Labor Law decision information. *See* FAR 22.2004–1(c)(5). See also section II(C)(2), above, for a discussion of the information the contractor must disclose.

Criteria for Classifying Violations

The Order directs the Department to assist agencies in determining whether administrative merits determinations, arbitral awards or decisions, or civil judgments (*i.e.,* Labor Law decisions) were issued for serious, repeated, willful, or pervasive violations of the Labor Laws. Order, section 4(b)(i). It specifies that the definitions of these terms should "incorporate existing statutory standards for assessing whether a violation is serious, repeated, or willful" where they are available. *Id.* The Order also provides some guidelines for developing standards where none are provided by statute. *See id.*

The sections below list criteria under which violations of the Labor Laws are considered serious, repeated, willful, or pervasive. These criteria include, for example, whether an agency applied a particular designation (*e.g.,* "repeated" under the OSH Act) to a violation, whether particular thresholds were met (*e.g.,* $10,000 in back wages), or whether other specific facts are present (*e.g.,* whether punitive damages were awarded). A single violation may satisfy the criteria for more than one classification; for example a single violation may be both serious and repeated. Multiple violations may together be classified as pervasive.

ALCAs classify violations based on information that is readily ascertainable from the Labor Law decisions themselves. ALCAs do not second-guess or re-litigate enforcement actions or the decisions of reviewing officials, courts, and arbitrators. While ALCAs and contracting officers may seek additional information from the enforcement agencies to provide context, they generally rely on the information contained in the Labor Law decisions to determine whether violations are serious, repeated, willful, and/or pervasive under the definitions provided in this Guidance.

Effect of Reversal or Vacatur of Basis for Classification

If a Labor Law decision or portion thereof that would otherwise cause a violation to be classified as serious, repeated, willful, and/or pervasive has been reversed or vacated, the violation should not be classified as such under the Order. For example, if an OSH Act violation was originally designated by OSHA as "serious" but is later re-designated as "other-than-serious," the violation should not be classified as a serious violation under the Order. Likewise, if a prior Labor Law decision that would otherwise cause a subsequent violation to be classified as a repeated violation is reversed or vacated, the subsequent violation should not be classified as a repeated violation.

1. Serious Violations

Of the Federal Labor Laws, only the OSH Act provides a statutory standard for what constitutes a "serious" violation, and this standard also applies to OSHA-approved State Plans. The other Federal Labor Laws do not have statutory standards for what constitutes a serious violation. According to the Order, where no statutory standards exist, the Department's Guidance for "serious" violations must take into account

> the number of employees affected, the degree of risk posed or actual harm done by the violation to the health, safety, or well-being of a worker, the amount of damages incurred or fines or penalties assessed with regard to the violation, and other considerations as the Secretary finds appropriate.

Order, section 4(b)(i)(B)(1).

Accordingly, a violation is "serious" for purposes of the Order under the following circumstances:

a. For OSH Act or OSHA-approved State Plan violations that are enforced through citations or equivalent State documents, a violation is serious if a citation, or equivalent State document, was designated as serious or an equivalent State designation.

b. For all other violations of the Labor Laws, a violation is serious if it is readily ascertainable from the Labor Law decision that the violation involved any one of the following:

i. The violation affected at least 10 workers, and the affected workers made up 25 percent or more of the contractor's workforce at the worksite or 25 percent or more of the contractor's workforce overall;

ii. Fines and penalties of at least $5,000 or back wages of at least $10,000 were due;

iii. The contractor's conduct caused or contributed to the death or serious injury of one or more workers;

iv. The contractor employed a minor who was too young to be legally employed or in violation of a Hazardous Occupations Order;

v. The contractor was issued a notice of failure to abate an OSH Act or OSHA-approved State Plan violation; or the contractor was issued an imminent danger notice or an equivalent State notice under the OSH Act or an OSHA-approved State Plan.

vi. The contractor retaliated against one or more workers for exercising any right protected by any of the Labor Laws;

vii. The contractor engaged in a pattern or practice of discrimination or systemic discrimination;

viii. The contractor interfered with the enforcement agency's investigation; or

ix. The contractor breached the material terms of any agreement or settlement entered into with an enforcement agency, or violated any court order, any administrative order by an enforcement agency, or any arbitral award.

This definition is an exhaustive list of the classification criteria for use in designating Labor Law violations as serious under the Order. Further guidance for applying these criteria is included below:

a. OSH Act and OSHA-Approved State Plan Violations Enforced Through Citations and Equivalent State Documents

Section 17(k) of the OSH Act, 29 U.S.C. 666(k), defines a violation as serious, in relevant part, "if there is a substantial probability that [the hazard created by the violation could result in] death or serious physical harm . . . unless the employer did not, and could not with the exercise of reasonable diligence know" of the existence of the violation. This standard is used by enforcement agencies to classify OSH Act and OSHA-Approved State Plan violations that are enforced through citations or equivalent State documents. In light of this clear statutory definition and the Order's directive to incorporate statutory standards where they exist, OSH Act violations that are enforced through citations are considered serious under the Order if—and only if—the relevant enforcement agency designated the citation or equivalent State document as such.[105]

The OSH Act also includes prohibitions that are not enforced through citations or equivalent State documents. Under the classification process in the Order, such violations are considered "serious" if they meet any of the other criteria for serious violations listed below in subsections (b)(i) through (b)(ix) and listed above in category (b). For example, the OSH Act prohibits retaliating against workers for exercising any right under the Act. 29 U.S.C. 660(c). OSH Act retaliation violations are enforced through complaints in Federal court, not through citations; and OSHA does not make any designation for them (serious or otherwise). As with retaliation under any of the Labor Laws, such a violation should be classified as "serious," even though OSHA has not designated it as "serious." *See* Section III(A)(1)(b)(vi).

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[105] The relevant enforcement agency will either be OSHA, a State Plan agency, or WHD, which enforces violations of the OSH Act's field sanitation and temporary labor camp standards in States that do not have a State Plan.

b. Other Violations of the Labor Laws

For violations of the Labor Laws other than OSH Act or OSHA-Approved State Plan violations that are enforced through citations and equivalent State documents, violations are serious if they meet any one of the following criteria:

i. Violation Affects at Least 10 Workers Comprising at Least 25 Percent of the Contractor's Workforce at the Worksite or Overall

Consistent with the Order's directive to consider the number of employees affected, a violation is serious if it affected at least 10 workers who together made up 25 percent or more of the contractor's workforce at the worksite or 25 percent or more of the contractor's workforce overall.

For purposes of this 25 percent threshold, "workforce" means all individuals on the contractor's payroll at the time of the violation, whether full-time or part-time. It does not include workers of another entity, unless the underlying violation of the Labor Laws includes a finding that the contractor is a joint employer of the workers that the other entity employs at the worksite. For example, assuming no joint employer relationships exist, if a contractor employs 40 workers at a worksite, then a violation is serious if it affects at least 10 of the contractor's workers at the site, even if other companies also employ an additional 40 workers at the same site.

For purposes of this 25 percent threshold, "worksite" means the physical location or group of locations where the workers affected by the violations work and where the contractor conducts its business. For example, if the contractor conducts its business at a single building, or a single office within an office building, that building or office will be the worksite. However, if the contractor conducts business activities in several offices in one building, or in several buildings in one campus or industrial park, the worksite consists of all of the offices or buildings in which the business is conducted. On the other hand, if a contractor has two office buildings in different parts of the same city, or in different cities, then those office buildings are considered to be separate worksites. For violations that affect workers with no fixed worksite, such as construction workers, transportation workers, workers who perform services at various customers' locations, and workers who regularly telework, the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report.

For purposes of this 25 percent threshold, "affected workers" means the workers who were individually impacted by the violation. For example, affected workers include workers who were not paid wages due; were denied leave or benefits; were denied a job, a promotion, or other benefits due to discrimination; or were harmed by an unlawful policy.

ii. Fines, Penalties, and Back Wages

Consistent with the Order's directive to take into account "the amount of damages incurred or fines or penalties assessed," a violation is serious if $5,000 or more in fines and penalties, or $10,000 or more in back wages, were due.

"Fines and penalties" are monetary penalties imposed by a government agency. They do not include back wages, compensatory damages, liquidated damages, or punitive damages. For purposes of determining whether the $10,000 back wages threshold is met, compensatory damages, liquidated damages under the FLSA,[106] and statutory damages under MSPA should be included as back wages.

The threshold amounts for back wages, fines, and penalties are measured by the amount "due." This will usually be the amount originally assessed by an enforcement agency or found due by a court, arbitrator, or arbitral panel. However, if the original amount is later reduced by an enforcement agency, arbitrator, arbitral panel, or court, the reduced amount is used. For example, if the Department files a civil complaint in an FLSA case seeking $15,000 in back wages but a court awards only $8,000, then the violation will not be serious under this criterion because the $8,000 figure falls below the $10,000 threshold for back wages. Similarly, if an administrative merits determination assesses $6,000 in civil monetary penalties against a contractor but later the enforcement agency and contractor reach a settlement for the reduced amount of $4,000, then the underlying violation is not serious because the settlement amount fell below the $5,000 threshold for fines and penalties. In contrast, if, for example, the contractor files for bankruptcy and cannot pay the full amount, or simply refuses to pay such that the full penalty is never collected, the original assessed amount is the amount that matters for classifying the violation under this criterion.

When considering whether these thresholds are met, the total fines and penalties or the total back wages resulting from the Labor Law violation should be considered. Thus, for example, where a wage-and-hour violation affected multiple workers, the back wages due to each worker involved in the claim must be added together to see if the cumulative amount meets the $10,000 back-wage threshold. Similarly, in cases where multiple provisions of a Labor Law have been violated, the fines, penalties, and back wages due should not be parsed and separately attributed to each provision violated. For example, if the Department's FLSA investigation discloses violations of the FLSA's minimum wage and overtime provisions and back wages are due for both violations, the total back wages due determines whether the $10,000 threshold is met. Likewise, if an investigation discloses six violations of the same MSPA provision or violations of six different MSPA provisions and each violation results in civil monetary penalties of $1,000, the MSPA violation is serious because the penalties total $6,000.

This criterion only applies if the Labor Law decision includes an amount of back wages or fines or penalties. Thus, for example, if an enforcement agency issues an administrative merits determination that does not include an amount of fines or penalties assessed or of back wages due, then an ALCA cannot classify the violation as serious using this criterion until the amount has been determined. For example, if the EEOC files a complaint in Federal court seeking back wages but does not specify the amount, then this criterion cannot be the basis for classifying the violation as serious, though the violation could be serious under one of the other listed criteria.

iii. Any Violations That Cause or Contribute to Death or Serious Injury

Consistent with the Order's directive to consider "the degree of risk posed or actual harm done by the violation to health, safety, or well-being of a worker," any violation of the Labor Laws that causes or contributes to the death or serious injury of one or more workers is serious under the Order. For the purpose of this classification criterion, "serious injury" means an injury that requires the care of a medical professional beyond first-aid treatment or results in more than five days of missed work.

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[106] Liquidated damages under the FLSA are included in the calculation of back wages because they are compensatory in nature, intended to serve as a substitute for "damages too obscure and difficult of proof for estimate other than by liquidated damages." *Overnight Motor Transp. Co.* v. *Missel,* 316 U.S. 572, 583–84 (1942).

iv. Employment of Minors Who Are Too Young To Be Legally Employed or in Violation of a Hazardous Occupations Order

Consistent with the Order's directive to consider "the degree of risk posed or actual harm done by the violation to health, safety, or well-being of a worker," any violation of the FLSA's child labor provisions where the minor is too young to be legally employed or is employed in violation of any of the Secretary's Hazardous Occupations Orders is a serious violation. Such violations do not include situations where minors are permitted to perform the work at issue but have performed the work outside the hours permitted by law. Rather, it refers to minors who, by virtue of their age, are legally prohibited from being employed or are not permitted to be employed to perform the work at all. Thus, serious violations include, for example: The employment of any minor under the age of 18 to perform a hazardous non-agricultural job, any minor under the age of 16 to perform a hazardous farm job, or any minor under the age of 14 to perform non-farm work where he or she does not meet a statutory exception otherwise permitting the work. This reflects the particularly serious dangers that can result from the prohibited employment of underage minors. Conversely, it is not a serious violation for the purposes of the Order where the contractor has employed a 14 or 15 year-old minor in excess of 3 hours outside school hours on a school day, in a non-hazardous, non-agricultural job in which the child is otherwise permitted to work—even though the work violates the FLSA's child labor provisions.

v. Notices of Failure To Abate and Imminent Danger Notices

Under the OSH Act and OSHA-approved State Plans, enforcement agencies may issue notices of failure to abate and imminent danger notices. Notices of failure to abate are issued when an employer has failed to remedy a violative condition despite having received a citation, unless that citation is being contested. *See* 29 CFR 1903.18. A notice of failure to abate a violation is a serious violation because failing to correct a hazard after receiving formal notification of the need to do so represents a serious disregard of the law.

Imminent danger notices are issued when "a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by [the OSH Act]." 29 U.S.C. 662(a). Because such notices are issued only for violations that imminently threaten to cause death or serious physical harm, imminent danger notices are by definition issued only for serious violations of the OSH Act, and thus constitute serious violations under the Order.

vi. Retaliation

Consistent with the Order's directive to consider "the degree of risk posed or actual harm done by the violation to health, safety, or well-being of a worker," a violation involving retaliation is a serious violation. For these purposes, retaliation means that the contractor has engaged in an adverse employment action against one or more workers for exercising any right protected by the Labor Laws. An adverse employment action means conduct that may dissuade a reasonable worker from engaging in protected activity under the Labor Laws, such as a discharge, refusal to hire, suspension, demotion, unlawful harassment, or threats.[107]

Examples of retaliation include, but are not limited to, disciplining workers for attempting to organize a union; firing or demoting workers who take leave under the FMLA; and threatening workers with adverse consequences—such as termination or referral to immigration or criminal authorities—for reporting potential violations of Labor Laws, testifying in enforcement matters, or otherwise exercising any right protected by the Labor Laws. These are serious violations because they both reflect a disregard by the contractor for its obligations under the Labor Laws and undermine the effectiveness of the Labor Laws by making workers reluctant to exercise their rights for fear of retaliation.

vii. Pattern or Practice of Discrimination or Systemic Discrimination

Consistent with the Order's directive to consider "the degree of risk posed or actual harm done by the violation to health, safety, or well-being of a worker," a violation is serious if the contractor engaged in a pattern or practice of discrimination or systemic discrimination. This criterion is generally expected to apply to violations of Executive Order 11246, section 503 of the Rehabilitation Act, VEVRAA, Title VII, section 6(d) of the FLSA (the Equal Pay Act), the ADA, and the ADEA.

A pattern or practice of discrimination involves intentional discrimination against a protected group of applicants or employees that reflects the employer's standard operating procedure, the regular rather than the unusual practice,[108] and not discrimination that occurs in an isolated fashion.

Systemic discrimination involves a pattern or practice, policy, or class case where the discrimination has a broad impact on an industry, profession, company, or geographic area. Examples include policies and practices that effectuate discriminatory hiring barriers; restrictions on access to higher level jobs in violation of any applicable anti-discrimination law; unlawful pre-employment inquiries regarding disabilities; and discriminatory placement or assignments that are made to comply with customer preferences.

Systemic discrimination also includes policies and practices that are seemingly neutral but may cause a disparate impact on protected groups. Examples include pre-employment tests used for selection purposes; height, weight or lifting requirements or restrictions; compensation practices and policies; and performance evaluation policies and practices. Systemic discrimination cases may be, but need not be, the subject of class action litigation.

viii. Interference With Investigations

Labor Law violations in which the contractor engaged in interference with the enforcement agency's investigation also are serious under the Order. Interference can take a number of forms, but for purposes of this criterion it is limited to violations involving the following circumstances:

(1) A civil judgment was issued holding the contractor in contempt for failing to provide information or physical access to an enforcement agency in the course of an investigation; or

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[107] *See Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 68 (2006) (holding that for purposes of Title VII, retaliation requires that "a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination") (internal citations omitted).

[108] *See Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 336 (1977).

(2) It is readily ascertainable from the Labor Law decision that the contractor—

(a) Falsified, knowingly made a false statement in, or destroyed records to frustrate an investigation under the Labor Laws;

(b) Knowingly made false representations to an investigator; or

(c) Took or threatened to take adverse actions against workers (for example, termination, reduction in salary or benefits, or referral to immigration or criminal authorities) for cooperating with or speaking to government investigators or for otherwise complying with an agency's investigation (for example, threatening workers if they do not return back wages received as the result of an investigation).

Like retaliation, interference with investigations is intentional conduct that frustrates the enforcement of the Labor Laws and therefore is a serious violation.

ix. Material Breaches and Violations of Settlements, Labor Compliance Agreements, or Orders

Labor Law violations involving a breach of the material terms of any settlement, labor compliance agreement, court or administrative order, or arbitral award are serious violations under the Order. Such violations are serious because contractors are expected to comply with orders by a court or administrative agency and to adhere to the terms of any agreements or settlements into which it enters. A contractor's failure to do so may indicate that it will similarly disregard its contractual obligations to, or agreements with, a contracting agency, which could result in delays, increased costs, and other adverse consequences. A contractor will not, however, be found to have committed a serious violation if the agreement, settlement, award, or order in question has been stayed, reversed, or vacated.

c. Table of Examples

For a table containing selected examples of serious violations, see Appendix A.

2. Repeated Violations

The Order provides that the standard for repeated should "incorporate existing statutory standards" to the extent such standards exist. Order, section 4(b)(i)(A). It further provides that, where no statutory standards exist, the standards for repeated should take into account "whether the entity has had one or more additional violations of the same or a substantially similar requirement in the past 3 years." *Id.* section 4(b)(i)(B)(2). None of the Labor Laws contains an explicit statutory definition of the term "repeated." Accordingly, a violation is "repeated" under the Order if:

a. For a violation of the OSH Act or an OSHA-approved State Plan that was enforced through a citation or an equivalent State document, the citation at issue was designated as "repeated," "repeat," or any equivalent State designation and the prior violation that formed the basis for the repeated violation became a final order of the OSHRC or equivalent State agency no more than 3 years before the repeated violation;

b. For all other Labor Law violations, the contractor has committed a violation that is the same as or substantially similar to a prior violation of the Labor Laws that was the subject of a separate investigation or proceeding arising from a separate set of facts, and became uncontested or adjudicated within the previous 3 years. The following is an exhaustive list of violations that are substantially similar to each other for these purposes:

1. For the FLSA:

i. Any two violations of the FLSA's child labor provisions; or

ii. Any two violations of the FLSA's provision requiring break time for nursing mothers.

2. For the FLSA, DBA, SCA, and Executive Order 13658:

i. Any two violations of these statutes' minimum wage, subminimum wage, overtime, or prevailing wages provisions, even if they arise under different statutes.

3. For the FMLA:

i. Any two violations of the FMLA's notice requirements; or

ii. Any two violations of the FMLA other than its notice requirements.

4. For the MSPA:

i. Any two violations of the MSPA's requirements pertaining to wages, supplies, and working arrangements;

ii. Any two violations of the MSPA's requirements related to health and safety;

iii. Any two violations of the MSPA's disclosure and recordkeeping requirements; or

iv. Any two violations related to the MSPA's registration requirements.

5. For the NLRA:

i. Any two violations of the same numbered subsection of section 8(a) of the NLRA.

6. For Title VII, section 503 of the Rehabilitation Act of 1973, the ADA, the ADEA, section 6(d) of the FLSA (known as the Equal Pay Act, 29 U.S.C. 206(d)), Executive Order 11246 of September 24, 1965, the Vietnam Era Veterans' Readjustment Assistance Act of 1972, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974:

i. Any two violations, even if they arise under different statutes, if both violations involve:

1. the same protected status, and

2. at least one of the following elements in common:

a. the same employment practice, or,

b. the same worksite.

7. For all of the Labor Laws, including those listed above, even if the violations arise under different statutes:

i. Any two violations involving retaliation;

ii. Any two failures to keep records required under the Labor Laws; or

iii. Any two failures to post notices required under the Labor Laws.

Further guidance for applying these criteria is included below:

a. OSH Act and OSHA-Approved State Plan Violations Enforced Through Citations or Equivalent State Documents

The terms "repeated" and "repeat" have well-established meanings under the OSH Act with regard to violations that are enforced through citations. Such violations are "repeated" "if, at the time of the alleged repeated violation, there was [an Occupational Safety and Health Review Commission] final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 O.S.H. Cas. (BNA) 1061 (O.S.H.R.C. 1979). This term is generally defined similarly under OSHA-approved State Plans.[109]

As such, under the OSH Act or an OSHA-approved State Plan, if a citation or equivalent State document designates a violation as "repeated," "repeat," or any equivalent State designation, the violation will be repeated for purposes of the Order provided that the prior violation became a final order of OSHRC or the equivalent State agency within 3 years of the repeated violation. Even though, under current OSHA policy, repeated violations take into account a 5-year period, the 3-year timeframe conforms to the Order's direction that the standards for repeated violations should take into account "whether the entity has had one or more additional violations of the same or a substantially similar requirement in the past 3 years." Order, section 4(b)(i)(B)(2).

b. All Other Violations

For all Labor Law violations other than OSH Act and OSHA-approved State Plan violations enforced through citations or equivalent State documents, a violation is repeated if it is the same as, or substantially similar to, a prior violation of the Labor Laws by the contractor that was the subject of a separate investigation or proceeding arising from a separate set of facts, and became uncontested or adjudicated within the previous 3 years. These terms are explained in greater detail below.

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[109] *See generally* "What Constitutes 'Repeated' or 'Willful' Violation for Purposes of State Occupational Safety and Health Acts," 17 A.L.R.6th 715 (originally published in 2006).

i. Prior Violation Must Have Been Uncontested or Adjudicated

For a violation to be classified as "repeated," a prior violation must be either uncontested or adjudicated. Only the prior violation need be uncontested or adjudicated when determining whether a violation is repeated. The subsequent violation—the one to be classified as "repeated"—does not need to have been uncontested or adjudicated. These terms are explained below.

An uncontested violation is a violation that is reflected in:

(2) A Labor Law decision that the contractor has not contested or challenged within the time limit provided in the Labor Law decision or otherwise required by law; or

(3) A Labor Law decision following which the contractor agrees to at least some of the relief sought by the agency in its enforcement action.

An adjudicated violation is one that is reflected in:

(1) a civil judgment;

(2) an arbitral award or decision; or

(3) an administrative merits determination that constitutes a final agency order by an administrative adjudicative authority following a proceeding in which the contractor had an opportunity to present evidence or arguments on its behalf.

As used in the above definition of an adjudicated violation, "administrative adjudicative authority" means an administrative body empowered to hear adversary proceedings, such as the ARB, the OSHRC, or the NLRB. ALJs are also administrative adjudicative authorities; however, their decisions will only constitute adjudicated violations if they are adopted as final agency orders. This typically will occur, for example, if the party subject to an adverse decision by an ALJ does not file a timely appeal to the agency's administrative appellate body, such as those referenced above.

For an ALCA to classify a subsequent violation as "repeated," the prior violation must be uncontested or adjudicated before the date of the Labor Law decision for the subsequent violation.

An example illustrating the above principles follows:

When WHD sends a contractor a letter finding that the contractor violated the DBA, if the contractor wishes to contest the violation, it must request a hearing in writing within 30 days. 29 CFR 5.11(b)(2). If the contractor timely requests a hearing, then the matter may proceed to a hearing before an ALJ, *id.* 5.11(b)(3), and, if necessary, the contractor may appeal to the ARB, *id.* 6.34. While these proceedings are pending, WHD's letter, by itself, cannot be a prior violation because it is neither uncontested nor adjudicated. Thus, if the contractor, during the pendency of those proceedings, receives a second letter from WHD finding that the contractor committed a substantially similar violation, the second violation would not be classified as repeated. However, once the ARB renders its decision, representing a final order of the Department of Labor, the first violation is considered adjudicated. If, after the ARB decision, the contractor receives a second letter about a second substantially similar violation, that second violation would be classified as a repeated violation under the Order, regardless of whether the second violation is uncontested or adjudicated.

The first letter may also become "uncontested" if the contractor agrees in a settlement to pay some or all of the back wages due. Thus, if the contractor agrees to such a settlement at any time after receiving the first letter, and the contractor subsequently receives a second letter from WHD finding that the contractor committed a second, substantially similar violation, then the second violation would be classified as repeated, regardless of whether the second violation is uncontested or adjudicated.

This framework is intended to ensure that violations will only be classified as repeated when the contractor has had the opportunity—even if not exercised—to present facts or arguments in its defense before an adjudicative authority concerning the prior violation.

ii. 3-Year Look-Back Period

For a violation to be classified as "repeated," the prior violation must have become uncontested or adjudicated no more than 3 years prior to the date of the repeated violation—the 3-year look-back period. The "date" of the repeated violation is the date of the relevant civil judgment, arbitral award or decision, or administrative merits determination (*e.g.* Labor Law decision) is issued.[110] For example, if the contractor's offer is dated March 1, 2019, then the contractor must disclose all Labor Law decisions within the 3-year disclosure period prior to the date of the offer, between March 1, 2016, and March 1, 2019. However, if one of the contractor's disclosed decisions is dated June 8, 2018, then the 3-year look-back period for determining whether that violation identified in the decision should be classified as repeated extends back to June 8, 2015.

The relevant date for determining whether a prior violation falls within the 3-year look-back period is the date that the prior violation becomes uncontested or adjudicated. A prior violation becomes uncontested either on the date on which any time period to contest the violation has expired, or on the date of the contractor's agreement to at least some of the relief sought by the agency in its enforcement action (*e.g.*, the date a settlement agreement is signed), whichever is applicable. A prior violation becomes adjudicated on the date on which the violation first becomes a civil judgment, arbitral award or decision, or a final agency order by an administrative adjudicative authority following a proceeding in which the contractor had an opportunity to present evidence or arguments on its behalf. Thus, for a violation that is the subject of successive adjudications, the dates of subsequent appellate decisions are not relevant.

For example, if OFCCP issues a show cause notice to a contractor on January 1, 2017, and the contractor contests the violation, resulting in an ALJ determination on January 1, 2018, an ARB determination on January 1, 2019, a civil judgment by a district court on January 1, 2020, and a civil judgment by a court of appeals on January 1, 2021, then the relevant date of the prior violation would be the January 1, 2019 date of the ARB order. This date is the relevant date because this is the date on which the violation becomes a final agency order by the ARB, and therefore first becomes an adjudicated violation—even though it is later adjudicated again in the civil judgments of the district court and court of appeals. That ARB order could therefore serve as a prior violation for any subsequent substantially similar violation for which a Labor Law decision is issued after January 1, 2019 and prior to January 1, 2022.

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[110] This means that the 3-year timeframe for determining whether a violation is repeated (the 3-year look-back period) is different from the 3-year timeframe within which all Labor Law decisions must be disclosed under the Order (the 3-year disclosure period), which is the 3 years prior to the date of the contractor's offer.

iii. Separate Investigations or Proceedings

The prior violation must be the subject of a separate investigation or proceeding arising from a separate set of facts. Thus, for example, if one investigation discloses that a contractor violated the FLSA and the OSH Act, or committed multiple violations of any one of the Labor Laws, such violations would not be "repeated" simply because of the other violations found in the same investigation.

iv. Prior Violation Must Be Committed by the Same Legal Entity

The prior violation must have been committed by the contractor, considered on a company-wide basis. Thus, a prior violation by any establishment of a multi-establishment company can render subsequent violations repeated, provided the other relevant criteria are satisfied, as long as the violation was committed by the same legal entity.[111] As discussed below, the relative size of the contractor as compared to the number of violations may be a mitigating factor.

v. Substantially Similar Violations

The prior violation must be the same as or substantially similar to the violation designated as repeated. Substantially similar does not mean "exactly the same." *United States* v. *Washam,* 312 F.3d 926, 930–31 (8th Cir. 2002). Rather, two things may be substantially similar where they share "'essential elements in common.'" *Alameda Mall, L.P.* v. *Shoe Show, Inc.,* 649 F.3d 389, 392–93 (5th Cir. 2011) (quoting the dictionary definition of the term).

Whether violations fall under the same Labor Law is not necessarily determinative of whether the requirements underlying those violations are substantially similar. Rather, as set forth in greater details below, whether a violation is substantially similar to a past violation turns on the nature of the violation and underlying obligation itself. The following definitions outline when, under the Order, a violation will be substantially similar to a prior violation (with the exception of OSH Act and OSHA State Plan violations enforced through a citation, which are addressed above):

FLSA

Any two violations of the FLSA's child labor provisions are substantially similar to each other. This reflects the treatment of such violations as "repeated" for purposes of civil monetary penalties in 29 CFR 579.2. Additionally, any two violations of the FLSA's provision requiring break time for nursing mothers are substantially similar to each other.

FLSA, DBA, SCA, and Executive Order 13658

Any violations of the minimum wage, subminimum wage, overtime, or prevailing wage requirements of the FLSA, DBA, SCA, and Executive Order 13658 are substantially similar to each other, even if the violations arise under different statutes.[112]

FMLA

Any two FMLA violations are substantially similar to each other under the Order, with the exception of violations of the notice requirements. Thus, denial of leave, retaliation, discrimination, failure to reinstate an employee to the same or an equivalent position, and failure to maintain group health insurance are all substantially similar, given that each violation involves either denying FMLA leave or penalizing an employee who takes leave. Conversely, any two instances of failure to provide notice—such as failure to provide general notice via a poster or a failure to notify individual employees regarding their eligibility status, rights, and responsibilities—are substantially similar to each other, but not to other violations of the FMLA.

MSPA

For violations of the MSPA, multiple violations of the statute's requirements pertaining to wages, supplies, and working arrangements (including, for example, failure to pay wages when due, prohibitions against requiring workers to purchase goods or services solely from particular contractors, employers, or associations, and violating the terms of any working arrangements) are substantially similar to each other for purposes of the Order. Likewise, violations of any of the MSPA's requirements related to health and safety, including both housing and transportation health and safety, are substantially similar to each other. Violations of the statute's disclosure and recordkeeping requirements are also substantially similar to each other. Finally, multiple violations related to the MSPA's registration requirements are substantially similar to each other.

NLRA

For NLRA violations, any two violations of the same numbered subsection of section 8(a) of the NLRA, 29 U.S.C. 158(a), are substantially similar. For example, any two violations of section 8(a)(3), which prohibits employers from discriminating against employees for engaging in or refusing to engage in union activities, are substantially similar. Likewise, any two violations of section 8(a)(2), which prohibits employers from dominating or assisting labor unions through financial support or otherwise, are substantially similar to each other.

The Anti-Discrimination Labor Laws

For purposes of the anti-discrimination Labor Laws,[113] violations are substantially similar if they involve both of the following elements, even if they arise under different statutes:

(1) the same protected status, *and*

(2) at least one of the following elements in common:

a. the same employment practice, *e.g.,* hiring, firing, harassment, compensation, or,

b. the same worksite.

With regard to the first element, violations are considered to involve the "same" protected status as long as the same status is present in both violations, even if other protected statuses may be involved as well. For example, if the first violation involves discrimination on the basis of national origin and the second violation involves discrimination on the basis of national origin and race, the violations are substantially similar because they involve the same protected status, namely, discrimination on the basis of national origin. Additionally, in this context, violations involving discrimination on the bases of sex, pregnancy, gender identity (including transgender status), and sex stereotyping are considered to involve the "same" protected status for the purpose of determining whether violations are substantially similar under the Order.

For the purpose of determining whether violations involve the same worksite, the definition of "worksite" set forth in the discussion of the 25 percent criterion for a serious violation should be used, *see* Section III(A)(1)(b)(i), except that any two company-wide violations are also considered to involve the same worksite.

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[111] However, as noted below, as to the anti-discrimination Labor Laws specifically, whether a violation was committed at the same worksite as a prior violation is one factor that can affect whether the two violations are substantially similar to each other.

[112] This treatment is consistent with the FLSA's regulations, which treat any two minimum wage or overtime violations as "repeated." *See* 29 CFR 578.3(b). This regulatory provision recognizes that two failures to pay wages mandated by law are substantially similar, even if they involve different specific obligations.

[113] Title VII, section 503 of the Rehabilitation Act of 1973, the ADA, the ADEA, section 6(d) of the FLSA (known as the Equal Pay Act, 29 U.S.C. 206(d)), Executive Order 11246 of September 24, 1965, the Vietnam Era Veterans' Readjustment Assistance Act of 1972, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974.

All of the Labor Laws

For all of the Labor Laws, including those referenced above, any two violations involving retaliation are substantially similar. Likewise, any two failures to keep records required under the Labor Laws are substantially similar. And, any two failures to post notices required under the Labor Laws are substantially similar.

c. Table of Examples

For a table containing selected examples of repeated violations, see Appendix B.

3. Willful Violations

The Order provides that the standard for what constitutes a "willful" violation should "incorporate existing statutory standards" to the extent such standards exist. Order, section 4(b)(i)(A). The Order further provides that, where no statutory standards exist, the standard for willful should take into account "whether the entity knew of, showed reckless disregard for, or acted with plain indifference to the matter of whether its conduct was prohibited by the requirements of the [Labor Laws]." Order, section 4(b)(i)(B)(3).

Accordingly, a violation is "willful" under the Order if:

a. For purposes of OSH Act or OSHA-approved State Plan violations that are enforced through citations or equivalent State documents, the citation or equivalent State document was designated as willful or any equivalent State designation (*e.g.,* "knowing");

b. For purposes of the minimum wage, overtime, and child labor provisions of the FLSA, 29 U.S.C. 206–207, 212, the administrative merits determination sought or assessed back wages for greater than 2 years or sought or assessed civil monetary penalties for a willful violation, or there was a civil judgment or arbitral award or decision finding that the contractor's violation was willful;

c. For purposes of the ADEA, the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded liquidated damages;

d. For purposes of Title VII or the ADA, the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual; or

e. For purposes of any other violations of the Labor Laws, it is readily ascertainable from the findings of the relevant enforcement agency, court, arbitrator, or arbitral panel that the contractor knew that its conduct was prohibited by any of the Labor Laws or showed reckless disregard for, or acted with plain indifference to, whether its conduct was prohibited by one or more requirements of the Labor Laws.

In the above definition, the Department incorporates existing standards, statutory or otherwise, from the Labor Laws that are indicative of willfulness as defined under the Order.

Further guidance for applying these criteria is included below:

a. OSH Act or OSHA-Approved State Plan Violations Enforced Through Citations or Equivalent State Documents

The term "willful" has a well-established meaning under the OSH Act that is consistent with the standard provided in the Order. Under the OSH Act, a violation that is enforced through a citation or equivalent State document will be designated as willful where an employer has demonstrated either an intentional disregard for the requirements of the OSH Act or a plain indifference to its requirements. *See A.E. Staley Mfg. Co.* v. *Sec'y of Labor,* 295 F.3d 1341, 1351–52 (D.C. Cir. 2002). For example, if an employer knows that specific steps must be taken to address a hazard, but substitutes its own judgment for the requirements of the legal standard, the violation will be designated as willful. OSHA-approved State Plans generally use this term in a similar way.[114] As such, as noted above, under the OSH Act or an OSHA-approved State Plan, if a citation or equivalent State document designates a violation as "willful" or an equivalent State designation (*e.g.,* "knowing"), the violation will be willful for purposes of the Order.

b. Violations of the Minimum Wage, Overtime, and Child Labor Provisions of the FLSA

The term "willful" has a well-established meaning under the FLSA that is consistent with the standard provided in the Order. Under the minimum wage, overtime, and child labor provisions of the FLSA, 29 U.S.C. 206–207, 212, a violation is willful where the employer knew that its conduct was prohibited by the FLSA or showed reckless disregard for the FLSA's requirements. *See* 29 CFR 578.3(c)(1), 579.2; *McLaughlin* v. *Richland Shoe Co.,* 486 U.S. 128, 133 (1988). For example, an employer that requires workers to "clock out" after 40 hours in a workweek and then continue working "off the clock" or pays workers for 40 hours by check and then pays them in cash at a straight-time rate for hours worked over 40 commits a willful violation of the FLSA's overtime requirements. These actions show knowledge of the FLSA's requirements to pay time-and-a-half for hours worked over 40 and an attempt to evade that requirement by concealing records of the workers' actual hours worked.

Under the minimum wage and overtime provisions of the FLSA, willful violations are grounds for administrative assessments of back wages for greater than 2 years, and for the assessment of civil monetary penalties. *See* 29 U.S.C. 216(e)(2); cf. 29 U.S.C. 255(a). Additionally, under the FLSA's child labor provisions, willful violations are also grounds for increased civil monetary penalties. *See* 29 U.S.C. 216(e)(1)(A)(ii); 29 CFR 579.5(c). Accordingly, administrative assessments of back wages for greater than 2 years and assessments of civil monetary penalties for willful violations are understood to reflect a finding of willfulness and therefore will be considered indicative of willfulness under the Order.[115] Courts and arbitrators must also make findings of willfulness in order to extend the statute of limitations beyond 2 years under the FLSA's minimum wage and overtime provisions, or to affirm assessments of civil monetary penalties of the FLSA's minimum wage, overtime, or child labor provisions. *See* 29 U.S.C. 216(e)(1)(A)(ii), 216(e)(2), 216(e)(3)(C), 255(a). Thus, any civil judgment or arbitral award or decision finding that the contractor committed a willful FLSA violation will be classified as a willful violation under the Order.

c. Violations of the ADEA

The term "willful" also has a well-established meaning under the ADEA that is consistent with the standard provided in the Order. Under the ADEA, a violation is willful when the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA. *See Trans World Airlines* v. *Thurston,* 469 U.S. 111, 126 (1985). Willful violations are required for liquidated damages to be assessed or awarded under the ADEA. *See* 29 U.S.C. 626(b). Accordingly, any violation of the ADEA in which the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded liquidated damages is understood to reflect a finding of willfulness and therefore will be considered indicative of a willful violation under the Order.

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[114] *See generally* Randy Sutton, "What Constitutes 'Repeated' or 'Willful' Violation for Purposes of State Occupational Safety and Health Acts," 17 A.L.R.6th 715 (originally published in 2006).

[115] Civil monetary penalties may be assessed under the FLSA's minimum wage and overtime provisions for violations that are either repeated or willful, and civil monetary penalties may be assessed for child labor violations even in the absence of a repeated or willful violation. Only civil monetary penalties involving willful violations will constitute willful violations under the Order.

d. Title VII and the ADA

Violations of Title VII or the ADA are "willful" under the Order if the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual. Punitive damages are appropriate in cases under Title VII or the ADA where the employer engaged in intentional discrimination with "malice or reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. 1981a(b)(1). This standard is analogous to the standard for willful violations in the Order. An employer acts with malice or reckless indifference if a managerial agent of the employer, acting within the scope of employment, makes a decision that was in the face of a perceived risk of violating Federal law, and the employer cannot prove that the manager's action was contrary to the employer's good faith efforts to comply with Federal law. *See Kolstad* v. *American Dental Ass'n,* 527 U.S. 526, 536, 545 (1999). For example, if a manager received a complaint of sexual harassment but failed to report it or investigate it—and the employer's anti-harassment policy was ineffective in protecting the employees' rights or the employer did not engage in good faith efforts to educate its managerial staff about sexual harassment—then the violation would warrant punitive damages and qualify as "willful" under the Order. *See, e.g., EEOC* v. *Mgmt. Hospitality of Racine, Inc.,* 666 F.3d 422, 438–39 (7th Cir. 2012).

e. Any Other Violations of the Labor Laws

For any violations of Labor Laws other than violations discussed above in subsections (a) through (d), a violation is willful for purposes of the Order if it is readily ascertainable from the findings of the relevant enforcement agency, court, arbitrator, or arbitral panel that the contractor knew that its conduct was prohibited by the Labor Laws or showed reckless disregard for, or acted with plain indifference to, whether its conduct was prohibited by Labor Laws.[116]

A contractor need not act with malice for a violation to be classified as willful; rather, the focus is on whether it is readily ascertainable from the Labor Law decision that, based on all of the facts and circumstances discussed in the findings, the contractor acted with knowledge of or reckless disregard for its legal requirements. The Labor Law decision need not include the specific words "knowledge," "reckless disregard," or "plain indifference"; however, it must be readily ascertainable from the factual findings or legal conclusions contained in the decision that the violation meets one of these conditions, as described further below.

Knowledge

The first circumstance where willfulness will be found is where it is readily ascertainable from the Labor Law decision that the contractor knew that its conduct was prohibited by law, yet engaged in the conduct anyway. Knowledge can be inferred from the factual findings or legal conclusions contained in the Labor Law decision. Thus, willfulness will typically be found where it is readily ascertainable from the Labor Law decision that a contractor was previously advised by responsible government officials that its conduct was not lawful, but engaged in the conduct anyway. Repeated violations may also be willful to the extent that the prior proceeding demonstrates that the contractor was put on notice of its legal obligations, only to later commit the same or a substantially similar violation. If it is readily ascertainable from the Labor Law decision that a contractor has a written policy or manual that describes a legal requirement, and then knowingly violates that requirement, the violation is also likely to be willful.

For example, if it is readily ascertainable from the Labor Law decision that a contractor was warned by an official from the Department that the housing it was providing to migrant agricultural workers did not comply with required safety and health standards, and that the contractor then failed to make the required repairs or corrections, such findings demonstrate that the contractor engaged in a willful violation of MSPA. Likewise, if the Labor Law decision indicates that a contractor's employee handbook states that it provides unpaid leave to employees with serious health conditions as required by the FMLA, but the contractor refuses to grant FMLA leave or erects unnecessary hurdles to employees requesting such leave, that violation would also likely be willful. Certain acts, by their nature, are willful, such as conduct that demonstrates an attempt to evade statutory responsibilities, including the falsification of records, fraud or intentional misrepresentation in the application for a required certificate, payment of wages "off the books," or "kickbacks" of wages from workers back to the contractor.

Reckless Disregard or Plain Indifference

The second type of willful violation is where it is readily ascertainable from the Labor Law decision that a contractor acted with reckless disregard or plain indifference toward the Labor Laws' requirements. These terms refer to circumstances where a contractor failed to make sufficient efforts to learn or understand whether it was complying with the law. Although merely inadvertent or negligent conduct would not meet this standard, ignorance of the law is not a defense to a willful violation. The adequacy of a contractor's inquiry is evaluated in light of all of the facts and circumstances, including the complexity of the legal issue and the sophistication of the contractor. In other words, the more obvious the violation, and the longer the contractor has been in business, the more likely it will be that a violation will be found willful. Reckless disregard or plain indifference may also be shown where a contractor was aware of plainly obvious violations and failed to take an appropriate action. For example, an employer who employs a 13-year-old child in an obviously dangerous occupation, such as operating a forklift, is acting in reckless disregard for the law even if it cannot be shown that the employer actually knew that doing so was in violation of one of the Secretary's Hazardous Occupation Orders related to child labor. Reckless disregard or plain indifference will also be found if a contractor acted with purposeful lack of attention to its legal requirements, such as if management-level officials are made aware of a health or safety requirement but make little or no effort to communicate that requirement to lower-level supervisors and employees.

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[116] Nothing in this guidance is intended to affect the terminology or operation of FAR part 22.4.

f. Table of Examples

For a table containing selected examples of willful violations, see Appendix C.

4. Pervasive Violations

The Order provides that, where no statutory standards exist, the standard for pervasive violations should take into account "the number of violations of a requirement or the aggregate number of violations of requirements in relation to the size of the entity." Order, section 4(b)(i)(B)(4). No statutory standards for "pervasive" exist under the Labor Laws.

Violations are "pervasive" if they reflect a basic disregard by the contractor for the Labor Laws as demonstrated by a pattern of serious and/or willful violations, continuing violations, or numerous violations. Violations must be multiple to be pervasive, although having multiple violations does not necessarily mean the violations are pervasive. The number of violations necessarily depends on the size of the contractor, because larger employers, by virtue of their size, are more likely to have multiple violations. To be pervasive, the violations need not be of the same or similar requirements of the Labor Laws. Pervasive violations may exist where the contractor commits multiple violations of the same Labor Law, regardless of their similarity, or violations of more than one of the Labor Laws. This classification is intended to identify those contractors whose numerous violations of Labor Laws indicate that they may view sanctions for their violations as merely part of the "cost of doing business," an attitude that is inconsistent with the level of responsibility required by the FAR.

Pervasive violations differ from repeated violations in a number of ways. First, unlike repeated violations, pervasive violations need not be substantially similar, or even similar at all, as long as each violation involves one of the Labor Laws. Additionally, pervasive violations, unlike repeated violations, may arise in the same proceeding or investigation. For example, a small tools manufacturer with about 50 employees in a single location that does not have a process for identifying and eliminating serious safety-and-health hazards may be cited multiple times for serious violations under the OSH Act—once for improper storage of hazardous materials, once for failure to provide employees with protective equipment, once for inadequate safeguards on heavy machinery, once for lack of fall protection, once for insufficient ventilation, once for unsafe noise exposure, and once for inadequate emergency exits. While these violations are sufficiently different that they would not be designated as repeated violations by OSHA and would therefore not be repeated violations under the Order, such a high number of serious workplace safety violations relative to the size of a small company with only a single location would likely demonstrate a basic disregard by the company for workers' safety and health, particularly if the company lacked a process for identifying and eliminating serious safety-and-health hazards. As such, these violations would likely be considered pervasive.

In addition, violations across multiple Labor Laws—especially when they are serious, repeated, or willful—are an indication of pervasive violations that warrant careful examination by the ALCA. For example, a medium-sized company with about 1,000 employees that provides janitorial services at Federal facilities may be found to have violated the SCA for failure to pay workers their required wages, Title VII for discrimination in hiring on the basis of national origin, the NLRA for demoting workers who are seeking to organize a union, and the FMLA for denying workers unpaid leave for serious health conditions. While these violations are substantively different from each other, a medium-sized company that violates so many Labor Laws is demonstrating a basic disregard for its legal obligations to its workers and is likely committing pervasive violations.

Whereas a repeated violation may be found anytime a contractor commits two or more substantially similar violations, there is no specific numeric threshold for pervasive violations. The number of violations that will result in a classification of pervasive will depend on the size of the contractor, as well as the nature and severity of the violations themselves.

A series of repeated violations may, however, become pervasive, particularly if it demonstrates that a contractor, despite knowledge of its violations, fails to make efforts to change its practices and continues to violate the law. For example, if WHD issued several administrative merits determinations over the course of 3 years finding that a contractor illegally employed underage workers, and despite receiving these notices, the contractor failed to make efforts to change its child labor practices and continued to violate the FLSA's child labor provisions, the series of violations would likely be considered pervasive.

For smaller companies, a smaller number of violations may be sufficient for a finding of pervasiveness, while for large companies, pervasive violations will typically require either a greater number of violations or violations affecting a significant number or percentage of a company's workforce. For example, if OFCCP finds that a large contractor with 50,000 employees that provides food services at Federal agencies nationwide used pre-employment screening tests for most jobs at the company's facilities that resulted in Hispanic workers being hired at a significantly lower rate than non-Hispanic workers over a 5-year period, and in addition, WHD finds that the company failed to comply with the SCA's requirements to pay its workers prevailing wages at many of its locations, such violations would likely be pervasive, notwithstanding the large size of the contractor, because the contractor's numerous serious violations spanned most of its locations and affected many of its workers. In contrast, had the company only engaged in these prohibited practices with respect to some of its hiring at only one a few of its locations, such violations might not necessarily be considered pervasive.

Similarly, if a large company with 5,000 employees that provides uniform services to Federal agencies in several States is cited 10 times for serious OSHA violations affecting most of its inspected locations over the span of a year, and a number of the citations involve the failure to abate extremely dangerous conditions—and as a result the company is placed on OSHA's Severe Violator Enforcement Program—such violations would likely be pervasive because the sheer number of violations over such a short period of time is evidence that the company is ignoring persistent threats to workers' safety, fails to treat safety as a serious problem, and is acting in disregard of its legal obligations. In contrast, if the violations affected only a few of the company's facilities, or if the company had acted quickly to abate any violations, the violations might not necessarily be considered pervasive.

An additional relevant factor in determining whether violations are pervasive is the involvement of higher-level management officials. When Labor Laws are violated with either the explicit or implicit approval of higher-level management, such approval signals that future violations will be tolerated or condoned, and may dissuade workers from reporting violations or raising complaints. Thus, to the extent that higher-level management officials were involved in violations themselves (such as discrimination in hiring by an executive, or a decision by an executive to cut back on required safety procedures that led to violations of the OSH Act) or knew of violations and failed to take appropriate actions (such as ignoring reports or complaints by workers), the violations are more likely to be deemed pervasive. By using the term "higher-level management," the Department agrees that a violation is unlikely to be pervasive for this reason where the manager involved is a low-level manager (such as a first-line supervisor) acting contrary to a strong company policy, and the company responds with appropriate remedial action.

For example, if the vice president of a construction company directs a foreman not to hire Native American workers, and as a result the company is later found to have committed numerous Title VII violations against job applicants, such violations are likely to be pervasive. Likewise, if the chief safety officer at a chemical plant fields complaints from many workers about several unsafe working conditions but then fails to take action to remedy the unsafe conditions, such violations are also likely to be pervasive because the known dangerous working conditions were disregarded by a high-level company official despite being reported by many workers at the plant. Such behavior reflects a basic disregard for worker health and safety.

For a table containing additional examples of pervasive violations, see Appendix D.

B. Weighing Labor Law Violations and Mitigating Factors

As discussed above, an ALCA's assessment of a contractor's Labor Law violations involves a three-step process: (1) Classifying violations to determine whether any are serious, repeated, willful, and/or pervasive; (2) weighing any serious, repeated, willful, and/or pervasive violations in light of the totality of the circumstances, including any mitigating factors that the contractor has identified; and then (3) providing the contracting officer with written analysis and advice regarding the contractor's record of Labor Law compliance. In analyzing a contractor's record during the weighing process, an ALCA does not need to give equal weight to two violations that receive the same classification. Some violations may have more significant consequences on a contractor's workforce or more potential to disrupt contractor performance than others.

In the weighing process, the ALCA considers many factors as a part of an analysis of whether the contractor has a satisfactory record of Labor Law compliance—in other words, whether the contractor's history of Labor Law compliance and any adoption by the contractor of preventative compliance measures indicate that the contracting officer could find the contractor to have a satisfactory record of integrity and business ethics. In considering the totality of the circumstances, the ALCA considers information about a contractor's violations obtained from enforcement agencies, as well as potentially mitigating information about those violations that a contractor has provided for review. In addition, although ALCAs review contractors' disclosed decisions, ALCAs will also consider Labor Law decisions that should have been disclosed by contractors under the Order, but were not. Such undisclosed decisions may be brought to the attention of an ALCA by the contracting officer, workers or their representatives, an enforcement agency, or any other source.

The weighing process is not mechanistic, and this Guidance cannot account for all of the possible circumstances or facts related to a contractor's record of Labor Law compliance. However, there are certain factors that in many cases will help inform an ALCA's analysis and advice. These factors, when present, will weigh for or against a conclusion that a contractor has a satisfactory record of Labor Law compliance. See Appendix E.

1. Mitigating Factors That Weigh in Favor of a Satisfactory Record of Labor Law Compliance

Mitigating factors weigh in favor of a conclusion that a contractor has a satisfactory record of Labor Law compliance. The list of factors below includes ones that an ALCA may be able to identify with information obtained from enforcement agencies. It also includes factors that an ALCA will not be able to identify unless the contractor provides the relevant information when given the opportunity to do so by the contracting officer. To ensure that all mitigating factors are considered by the ALCA, the contractor should avail itself of the opportunity to provide all the information it believes demonstrates a satisfactory record of Labor Law compliance.

Generally, the most important mitigating factor will be the extent to which the contractor has remediated the violation(s) and taken steps that will prevent recurrence in the future. Other mitigating factors include where the contractor has only a single disclosed violation; where the number of violations is low relative to the size of the contractor; where the contractor has implemented a safety-and-health management program, a collectively-bargained grievance procedure, or other compliance program; where a violation resulted from a recent legal or regulatory change; where the findings in the relevant Labor Law decision support the contractor's defense that it acted in good faith or had reasonable grounds for believing that it was not violating the law; and where the contractor has maintained a long period of compliance following any violations.

None of these mitigating factors are necessarily determinative. Nor is this an exhaustive list. In some cases, depending on the circumstances, several mitigating factors may need to be present in order for an ALCA to conclude that a contractor has a satisfactory record of Labor Law compliance. In other cases, the presence of only one of these factors may be sufficient to support such a conclusion.

a. Remedial Measures

As noted above, the extent to which a contractor has remediated a Labor Law violation will typically be the most important factor that can mitigate the effect of a violation. Remedial measures can include measures taken to correct an unlawful practice, make affected employees whole, or otherwise comply with a contractor's obligations under the Labor Laws. Remedial measures also may include the implementation of new procedures and practices, or other actions, in order to promote future compliance. Contractors may take remedial measures voluntarily, through a settlement agreement with an enforcement agency or private parties, or pursuant to a court order. Remedial measures may also be taken as a result of labor compliance agreements, which are discussed in section III(C) below.

Where a contractor institutes remedial measures, this may indicate that a contractor has recognized the need to address a violation and has taken steps to bring itself into compliance with the law. The timeliness with which a contractor agrees to, initiates, or completes the implementation of remedial measures may be relevant to the weight that an ALCA gives to this factor. Similarly, failure to remediate a violation may demonstrate disregard for legal obligations, which in turn may raise concerns about a contractor's commitment or ability to comply with the law during future contract performance.

b. Only One Violation

While a contracting officer is not precluded from making a determination of nonresponsibility based on a single violation in the circumstances where merited, the Order provides that, in most cases, a single violation of a Labor Law may not necessarily give rise to a determination of lack of responsibility, depending on the nature of the violation. Order, section 4(a)(i). Thus, when considering mitigating factors, an ALCA may generally consider the existence of only a single violation during the 3-year disclosure period as weighing in favor of a conclusion that the contractor has a satisfactory record of Labor Law compliance.

c. Low Number of Violations Relative to Size

Larger contractors, by virtue of their size, are more likely to have multiple violations than smaller ones. When assessing contractors with multiple violations, the size of the contractor is considered.

d. Safety-and-Health Programs, Grievance Procedures, or Other Compliance Programs

Contractors can help to assure future compliance by implementing a safety-and-health management program such as OSHA's 1989 Safety and Health Program Management guidelines or any updates to those guidelines,[117] grievance procedures (including collectively-bargained ones), monitoring arrangements negotiated as part of either a settlement agreement or labor compliance agreement, or other similar compliance programs. Such programs and procedures can foster a corporate culture in which workers are encouraged to raise legitimate concerns about Labor Law violations without the fear of repercussions; as a result, they may also prompt workers to report violations that would, under other circumstances, go unreported. Therefore, implementation or prior existence of such a program is a mitigating factor.

e. Recent Legal or Regulatory Change

To the extent that the Labor Law violations can be traced to a recent legal or regulatory change, this may be a mitigating factor. This may be a case where a new agency or court interpretation of an existing statute is applied retroactively and a contractor's pre-change conduct is found to be a violation. For example, where prior agency or court decisions suggested that a practice was lawful, but the Labor Law decision finds otherwise, this may be a mitigating factor.

f. Good Faith and Reasonable Grounds

It may be a mitigating factor where the findings in the relevant Labor Law decision support the contractor's defense that it had reasonable grounds for believing that it was not violating the law. For example, if a contractor acts in reliance on advice from a responsible official from the relevant enforcement agency, or an authoritative administrative or judicial ruling on a similar case, such reliance will typically demonstrate good faith and reasonable grounds. This mitigating factor also applies where a violation otherwise resulted from the conduct of a government official. For example, a DBA violation may be mitigated where the contracting agency failed to include the relevant contract clause and wage determination in a contract.

g. Significant Period of Compliance Following Violations

If, following one or more violations within the 3-year disclosure period, the contractor maintains a steady period of compliance with the Labor Laws, such compliance may mitigate the existence of prior violations (*e.g.,* violations were reported from 2½ years ago and there have been none since). This is a stronger mitigating factor where the contractor has a recent Labor Law decision that it must disclose, but the underlying conduct took place significantly before the 3-year disclosure period and the contractor has had no subsequent violations.

2. Factors That Weigh Against a Satisfactory Record of Labor Law Compliance

There are also factors that weigh against a conclusion that a contractor has a satisfactory record of Labor Law compliance. The list of factors below is not exhaustive. Nor are any of these factors necessarily determinative. An ALCA reviews these factors as part of an evaluation of the totality of the circumstances. In some cases, several factors may need to be present in order for an ALCA to conclude that a contractor has an unsatisfactory record of Labor Law compliance. Depending on the facts of the case, even where multiple factors are present, they may be outweighed by mitigating circumstances.

a. Pervasive Violations

As described in section III(A)(4) above, pervasive violations are violations that demonstrate a basic disregard for the Labor Laws. Such disregard of legal obligations creates a heightened danger that the contractor may, in turn, disregard its contractual obligations as well. Additionally, such contractors are more likely to violate the Labor Laws in the future, and those violations—and any enforcement proceedings or litigation that may ensue—may imperil their ability to meet their obligations under a contract. Accordingly, where an ALCA has classified violations as pervasive (in the classification step described above in section III(A)), this weighs strongly against a satisfactory record of Labor Law compliance.

b. Violations That Meet Two or More of the Categories Discussed Above (Serious, Repeated, and Willful)

A violation that falls into two or more of the categories is also, as a general matter, more likely to be probative of the contractor's disregard for legal obligations and unsatisfactory working conditions than a violation that falls into only one of those categories. Accordingly, where an ALCA has classified a violation as both repeated and willful, for example, the violation will tend to weigh more strongly against a satisfactory record of Labor Law compliance than a similar violation that is repeated or willful, but not both.

c. Violations of Particular Gravity

In analyzing a contractor's record, an ALCA does not need to give equal weight to two violations that have received the same classification. Labor Law violations of particular gravity include, but are not limited to, violations related to the death of an employee; violations involving a termination of employment for exercising a right protected under the Labor Laws; violations that detrimentally impact the working conditions of all or nearly all of the workforce at a worksite; and violations where the amount of back wages, penalties, and other damages awarded is greater than $100,000.

d. Violations for Which Injunctive Relief Is Granted

Both preliminary and permanent injunctions are rarely granted by courts and require a showing of compelling circumstances, including irreparable harm to workers and a threat to the public interest. Accordingly, where a court grants injunctive relief to remedy a violation that is already classified as serious, repeated, willful, and/or pervasive, the ALCA should take this into account as a factor that increases the significance of that violation to the contractor's overall record of Labor Law compliance.

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[117] In addition, there are two voluntary industry consensus standards that, if implemented, should be considered as mitigating factors for violations involving workplace safety and health: The ANSI/AIHA Z10—2005 Occupational Safety and Health Management Systems (ANSI/AIHA, 2005), and the OHSAS 18001—2007 Occupational Health and Safety Management Systems (OHSAS Project Group, 2007).

e. Violations That Are Reflected in Final Orders

To the extent that the judgment, determination, or order finding a Labor Law violation is final (because appeals and opportunities for further review have been exhausted or were not pursued), the violation should be given greater weight than a similar violation that is not yet final. While a violation that is not final should be given lesser weight, it will still be considered as relevant to a contractor's record of Labor Law compliance.

C. Advice Regarding a Contractor's Record of Labor Law Compliance

As discussed above, an ALCA's assessment of a contractor's Labor Law violations involves a three-step process: (1) Classifying violations to determine whether any are serious, repeated, willful, and/or pervasive; (2) weighing any serious, repeated, willful, and/or pervasive violations in light of the totality of the circumstances, including any mitigating factors that the contractor has identified; and then (3) providing the contracting officer with written analysis and advice regarding the contractor's record of Labor Law compliance.

The ALCA determines what advice and analysis to give to the contracting officer through the classification and weighing steps. In providing advice, the ALCA carefully considers the contractor's record of Labor Law compliance and makes a recommendation regarding whether it could support a finding, by the contracting officer, that the contractor has a satisfactory record of integrity and business ethics. *See* FAR 22.2004–2(b)(3)–(4). As a part of this analysis, the ALCA considers whether a labor compliance agreement is warranted to ensure the contractor's compliance with the Labor Laws during future contract performance—and, if so, the timing of the negotiations. *Id.*

Labor compliance agreements are negotiated by the contractor and the relevant enforcement agency/agencies. These agreements may include enhanced remedial measures intended to prevent future violations and increase compliance with Labor Laws. Examples of enhanced remedial measures include, but are not limited to, specific changes in the contractor's business policies and operations, adoption of a safety-and-health management system, assessment by outside consultants, internal compliance audits or external compliance monitoring, and enterprise-wide applicability of remedial measures. A contractor may enter into a labor compliance agreement while at the same time continuing to contest an underlying Labor Law violation.

A labor compliance agreement is warranted where the contractor has serious, repeated, willful, and/or pervasive Labor Law violations that are not outweighed by mitigating factors and the ALCA identifies conduct or policies that could be addressed through preventative actions. Where this is the case, the contractor's history of Labor Law violations demonstrates a risk to the contracting agency of violations during contract performance, but these risks may be mitigated through the implementation of appropriate enhanced compliance measures. A labor compliance agreement also may be warranted where the contractor presently has a satisfactory record of Labor Law compliance, but there are also clear risk factors present, and a labor compliance agreement would reduce these risk factors and demonstrate steps to maintain Labor Law compliance during contract performance.

When an ALCA recommends a labor compliance agreement, the ALCA has three options regarding the timing of negotiations: (1) The contractor must commit, after award, to negotiate an agreement; (2) the contractor must commit, before award, to negotiate an agreement; or (3) the contractor must enter into an agreement before award. FAR 22.2004–2(b)(3)(ii)–(iv).

1. ALCA Recommendation

The ALCA's advice to the contracting officer must include one of the following recommendations: The contractor's record of Labor Law compliance—

(i) Supports a finding, by the contracting officer, of a satisfactory record of integrity and business ethics;

(ii) Supports a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, but the prospective contractor needs to commit, after award, to negotiating a labor compliance agreement or another acceptable remedial action;

(iii) Could support a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, only if the prospective contractor commits, prior to award, to negotiating a labor compliance agreement or another acceptable remedial action;

(iv) Could support a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, only if the prospective contractor enters, prior to award, into a labor compliance agreement; or

(v) Does not support a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, and the agency suspending and debarring official should be notified in accordance with agency procedures.

FAR 22.2004–2(b)(3). Additional guidance regarding each recommendation is provided below.

a. Satisfactory Record

A contractor has a satisfactory record of Labor Law compliance where it has no Labor Law violations within the 3-year disclosure period or has no violations that meet the definitions of serious, repeated, willful, and/or pervasive. Under these circumstances an ALCA may recommend that the contractor's record supports a finding, by the contracting officer, of a satisfactory record of integrity and business ethics. This recommendation may also be appropriate where the contractor does have violations that meet the definitions of serious, repeated, willful, and/or pervasive, but under the totality of the circumstances the existence of the violations is outweighed by mitigating factors or other relevant information.

b. Commitment After Award

An ALCA may recommend that a contractor needs to commit, after the award, to a labor compliance agreement where the contractor presently has a satisfactory record of Labor Law compliance, but there are also clear risk factors present, and a labor compliance agreement is warranted to reduce these risk factors and demonstrate steps to maintain Labor Law compliance during contract performance. This may be the case, for example, where the contractor has serious, repeated, and/or willful violations that have not been fully remediated, and the ALCA has concerns that the problems related to these violations could affect future contract performance. This may also be the case where the ALCA is concerned that the contractor has not fully addressed managerial issues that could result in violations that would impact performance of the contract. Another example is where one or more of the contractor's violations are presently in litigation and may result in final orders against the contractor in the future. This recommendation is not appropriate where the contractor's violations are already pervasive.

c. Commitment Before Award

An ALCA may recommend that a contractor needs to commit, prior to the award, to a labor compliance agreement where the contractor's labor violation history demonstrates an unsatisfactory record of integrity and business ethics unless further action is taken before the award. This recommendation may be appropriate, for example, where the contractor has previously failed to respond or provide adequate justification for not responding when notified of the need for a labor compliance agreement. It may also be appropriate where the contractor has not been previously advised of the need for a labor compliance agreement, but the labor violation history demonstrates an immediate need for a commitment to negotiate—for example, where the contractor has pervasive violations, or, in certain circumstances, multiple violations of particular gravity.

d. Enter Into Agreement Before Award

An ALCA may also recommend that a contractor must negotiate and enter into a labor compliance agreement prior to the award. As with the recommendation described in section (c) above, this recommendation is appropriate where the contractor's labor violation history demonstrates an unsatisfactory record of integrity and business ethics unless further action is taken before the award. Depending on the conduct of the contractor and severity of violations, the same circumstances described in section (c) may justify an increased level of concern about future contract performance. In these circumstances, the ALCA may conclude that a commitment alone prior to the award is not sufficient and that the agreement must be fully negotiated and signed before the award can take place.

e. Notification to Agency Suspending and Debarring Official

Although in many cases, a labor compliance agreement is warranted to address a contractor's unsatisfactory record of Labor Law compliance, there are circumstances in which negotiation of a labor compliance agreement may not be warranted. In these circumstances, an ALCA should recommend that the contractor's record does not support a finding of a satisfactory record of integrity and business ethics and that the agency suspending and debarring official should be notified. This may be the case, for example, where an agreement cannot be reasonably expected to improve future compliance. This may also be the case where the contractor has shown a basic disregard for Labor Law, such as by previously failing to enter into a labor compliance agreement after being given a reasonable time to do so. Another example is where the contractor has breached an existing labor compliance agreement. One more example is where the contractor has previously entered into a labor compliance agreement and subsequently commits pervasive violations or multiple violations of particular gravity.

2. ALCA Analysis

The ALCA's recommendation must be accompanied by a written analysis. *See* FAR 22.2004–2(b)(4). The written analysis must include the number of Labor Law violations; their classification as serious, repeated, willful and/or pervasive; any mitigating factors or remedial measures; and any additional information that the ALCA finds to be relevant. *See id.*

If the ALCA concludes that a labor compliance agreement is warranted, then the written analysis must include a supporting rationale for the recommendation and the name of the enforcement agency or agencies that would execute the agreement. *See* FAR 22.2004–2(b)(4)(v), (4)(viii). The rationale should include the ALCA's explanation for any recommendation regarding when the contractor must negotiate a labor compliance agreement, *i.e.,* before or after award. *See id.* 22.2004–2(b)(4)(v). The ALCA's explanation also should include a rationale for any recommendation that the contractor must enter into a labor compliance agreement before award. *See id.*

If the ALCA recommends that the contractor's record of Labor Law compliance does not support a finding of a satisfactory record of integrity and business ethics, the ALCA's analysis must include: The rationale for the finding, whether the ALCA supports notification to the suspending and debarring official, and whether the ALCA intends to make such notification. FAR 22.2004–2(b)(4)(vi)–(vii).

In response to the ALCA's analysis and advice, the contracting officer takes appropriate action, as described in the FAR rule. *See* FAR 22.2004–2(b)(5) (listing appropriate actions and procedures). If the ALCA's assessment indicates that a labor compliance agreement is warranted, the contracting officer provides written notification to the contractor prior to the award about the contractor's obligations. *See id.* 22.2004–2(b)(7). When the ALCA learns that the contractor has entered into a labor compliance agreement, the ALCA must make a notation in FAPIIS. *Id.* 22.2004–1(c)(6).

IV. Postaward Disclosure Updates and Assessment of Labor Law Violations

After receiving a contract award, contractors must continue to disclose any new Labor Law decisions or updates to previously disclosed decisions. *See* Order, section 2(b); FAR 22.2004–3(a), 52.222–59. The contactor must make the disclosures in the SAM database at *www.sam.gov.* FAR 22.2004–3(a)(1). These disclosures must be made semiannually. *Id.*

During performance of the contract, the ALCA has the duty to monitor Labor Law decision information. The ALCA has the duty to monitor SAM and FAPIIS to review any new or updated contractor disclosures. FAR 22.2004–3(b)(1). Where a contractor previously agreed to enter into a labor compliance agreement, the ALCA also has the duty to verify whether the contractor is making progress toward reaching an agreement, or has entered into and is meeting the terms of the agreement. *See id.* The ALCA also may consider Labor Law decision information received from sources other than the procurement databases. *Id.*

If the ALCA has received information indicating that further consideration or action may be warranted, then the ALCA shall notify the contracting officer in accordance with agency procedures. FAR 22.2004–3(b)(1). When this happens, the contracting officer must afford the contractor the opportunity to provide any additional information that the contractor may wish to provide for consideration—including remedial measures or other mitigating factors related to newly-disclosed decisions, or an explanation for any delay in entering into a labor compliance agreement. *Id.* 22.2004–3(b)(2).

A. Semiannual Disclosure Updates

If there are new Labor Law decisions or updates to previously disclosed Labor Law decisions, the contractor is required to disclose this information during performance of the contract. *See* FAR 22.2004–3(a); 52.222–59(b) (contract clause). Section II(A) above describes the covered contracts for which the initial preaward disclosure is required. *See also* FAR 22.2004–1(a).

Contractors must make these postaward disclosures semiannually in the SAM database. FAR 22.2004–3(a)(1). The contractor has flexibility in establishing the date for the semiannual update. The contractor may use the six-month anniversary date of contract award, or the contractor may choose a different date before that six-month anniversary date. *Id.* 22.2004–3(a)(2). In either case, the contractor must continue to update it semiannually. *Id.*

The types of Labor Law decisions that must be disclosed during the postaward period are the same as during the preaward period: Administrative merits determinations, civil judgments, and arbitral awards or decisions. *See* FAR 52.222–59(a) (defining "labor law decision"). The definition of each of these Labor Law decisions is the same as applies preaward. *See id.* See section II(B) above for the detailed definitions.

Postaward updates should include (a) any new Labor Law decisions rendered since the last disclosure and (b) updates to previously disclosed information. As noted above in section II(B)(4) of this Guidance, contractors must report new Labor Law decisions even if they arise from a previously-disclosed Labor Law violation. For example, if a contractor initially disclosed a Federal district court judgment finding that it violated the FLSA, it must disclose as part of the periodic updates any subsequent Federal court of appeals decision affirming that judgment. In a postaward disclosure, contractors may also submit updated information reflecting the fact that a previously disclosed Labor Law decision has been vacated, reversed, or otherwise modified.

In any postaward update, contractors must disclose the same information about any individual Labor Law decision that must be disclosed preaward: (a) The Labor Law that was violated; (b) the case number, inspection number, charge number, docket number, or other unique identification number; (c) the date the Labor Law decision was rendered; and (d) the name of the court, arbitrator(s), agency, board, or commission that rendered the decision. *See* FAR 52.222–59(b)(1). And, as with preaward disclosures, the contractor is encouraged to submit such additional information as the contractor deems necessary, including mitigating circumstances and remedial measures. *See id.* 52.222–59(b)(3).

B. ALCA Assessment and Advice

Once the contractor has been given an opportunity to provide additional information, the ALCA follows the same classification, weighing, and advice processes that the ALCA follows in the preaward period, which are described in section III above. The ALCA provides written analysis and advice to the contracting officer regarding appropriate actions for the contracting officer's consideration. This postaward analysis and advice is similar to the preaward process discussed above in section III(C). The postaward analysis and advice should include:

> (i) Whether any violations should be considered serious, repeated, willful, or pervasive;
>
> (ii) The number and nature of violations (depending on the nature of the labor law violation, in most cases, a single labor law violation may not necessarily warrant action);
>
> (iii) Whether there are any mitigating factors;
>
> (iv) Whether the contractor has initiated and implemented, in a timely manner—
>
> i. Its own remedial measures; or
>
> ii. Other remedial measures entered into through agreement with, or as a result of, the actions or orders of an enforcement agency, court, or arbitrator;
>
> (v) Whether a labor compliance agreement or other remedial measure is —
>
> (A) Warranted and the enforcement agency or agencies that would execute such agreement with the contractor;
>
> (B) Under negotiation between the contractor and the enforcement agency;
>
> (C) Established, and whether it is being adhered to; or
>
> (D) Not being negotiated or has not been established, even though the contractor was notified that one had been recommended, and the contractor's rationale for not doing so.
>
> (vi) Whether the absence of a labor compliance agreement or other remedial measure, or noncompliance with a labor compliance agreement, demonstrates a pattern of conduct or practice that reflects disregard for the recommendation of an enforcement agency.
>
> (vii) Whether the labor law violation(s) merit consideration by the agency suspending and debarring official and whether the ALCA will make such a referral; and
>
> (viii) Any such additional information that the ALCA finds to be relevant.

FAR 22.2004–3(b)(3). In determining whether a labor compliance agreement is warranted or whether the Labor Law decisions merit consideration by the agency suspending and debarring official, the ALCA should consider the guidance provided above in section III(C).

In response to new information about Labor Law violations, the contracting officer may take no action and continue the contract, or may exercise a contract remedy as appropriate. *See* FAR 22.2004–3(b)(4) (listing appropriate actions and procedures).

V. Subcontractor Responsibility

In addition to contracts between contractors and contracting agencies, the Order also applies to certain subcontracts with an estimated value that exceeds $500,000. FAR 52.222–59(c). The subcontracts to which the Order applies are described as "covered subcontracts" in this Guidance. As noted above, covered subcontracts include subcontracts for commercial items, but do not include subcontracts for commercially available off-the-shelf (COTS) items. *See id.* 52.222–59(c)(1)(i) (excluding COTS contracts); 2.101 (defining COTS items).

Prime contractors working on contracts covered by the Order are required to consider prospective subcontractors' records of Labor Law compliance when making responsibility determinations for prospective subcontractors. FAR 52.222–59(c). This requirement applies to subcontractors at all tiers. *Id.* 52.222–59(g).

A. Preaward Subcontractor Disclosures

Prospective subcontractors for a covered subcontract must (like prime contractors on a covered procurement contract) make an initial representation to the contractor about compliance with Labor Laws, followed by a more detailed disclosure. *See* FAR 52.222–59(c)(3). See also section II(C)(1), above, describing contractor disclosures. The prospective subcontractor must make the detailed disclosure to the Department, *id.* 52.222–59(c)(3)(ii), by following the procedure at the "Subcontractor Disclosures" tab at *www.dol.gov/fairpayandsafeworkplaces.* The Department, in turn, provides advice to the subcontractor that the subcontractor then provides to the contractor to use in the responsibility determination.

1. Initial Representation

In the initial representation to the contractor, prospective subcontractors must represent whether there have been any Labor Law decisions rendered against the subcontractor in the period beginning on October 25, 2015 to the date of the subcontractor's offer, or for three years preceding the date of the subcontractor's offer, whichever period is shorter. FAR 52.222–59(c)(3)(i).

2. Detailed Disclosure to the Department

Prospective subcontractors must make a more detailed disclosure to the Department. FAR 52.222–59(c)(3)(ii). Subcontractors must disclose the same detailed information that prime contractors themselves must disclose on a covered procurement contract. *See id.; see also* Guidance, section II(C)(1) (describing contractor disclosures). Subcontractors must disclose all covered Labor Law decisions, and subcontractors also may provide additional information to the Department that the subcontractor believes will demonstrate its responsibility. *Id.* 52.222–59(c)(3)(iii). This may include information on mitigating circumstances and remedial measures, such as information about steps taken to correct the violations at issue, the negotiation or execution of a settlement agreement or labor compliance agreement, or other steps taken to achieve compliance with the Labor Laws.

3. Providing the Department's Advice to the Contractor

When a prospective subcontractor submits Labor Law violation and other information to the Department, the Department provides the subcontractor with advice regarding its record of Labor Law compliance. FAR 52.222–59(c)(4)(ii)(C). The subcontractor then must provide the Department's advice to the contractor for the contractor's use in determining whether the subcontractor is a responsible source. *Id.*

B. Preaward Department of Labor Advice to the Subcontractor

After receiving a subcontractor's detailed disclosures, the Department provides advice to the subcontractor about its record of Labor Law compliance. The advice may include (1) that the subcontractor has no serious, repeated, willful, or pervasive violations; (2) that the subcontractor has serious, repeated, willful, or pervasive violations but that a labor compliance agreement is not warranted because, for example, the contractor has initiated and implemented its own remedial measures; (3) that the subcontractor has serious, repeated, willful, or pervasive violations and a labor compliance agreement is warranted; (4) that a labor compliance agreement is warranted and the subcontractor has not entered into such an agreement in a reasonable period of time; (5) that the subcontractor is not complying with a labor compliance agreement into which it previously entered; or (6) that the subcontractor is complying with a labor compliance agreement into which it previously entered. *See* FAR 52.222–59(c)(4)(ii)(C).

In assessing subcontractor Labor Law compliance, the Department applies the same guidance on classification and weighing of Labor Law violations included above in sections III(A) and III(B) of this Guidance. In carrying out the assessment, Department officials and ALCAs may receive information from an enforcement agency about the subcontractor's compliance record. This information will be evaluated objectively and without regard for the enforcement agency's litigation interests.

C. Preaward Determination of Subcontractor Responsibility

The prime contractor (not the Department) has the duty to make a determination that its subcontractors are responsible sources. *See* FAR 9.104–4(a). When assessing a prospective subcontractor's responsibility, the contractor may find that the prospective subcontractor has a satisfactory record of integrity and business ethics with regard to compliance with Labor Laws under certain specified conditions. These conditions are:

1. The Subcontractor Has No Covered Labor Law Decisions To Disclose

The contractor may find the subcontractor to have a satisfactory record where the subcontractor has represented that it has no covered Labor Law decisions to disclose. *See* FAR 52.222–59(c)(4)(i).

2. The Department Advises That the Subcontractor Has No Serious, Repeated, Willful, or Pervasive Violations

The contractor may find the subcontractor to have a satisfactory record where the subcontractor has received advice from the Department that none of the subcontractor's violations are serious, repeated, willful, or pervasive; and the subcontractor has provided notice of this advice to the contractor. *See* FAR 52.222–59(c)(4)(ii)(C)(*1*).

3. The Department Advises That the Subcontractor Has Taken Sufficient Action To Remediate Violations

The contractor may find the subcontractor to have a satisfactory record where the subcontractor has received advice from the Department that it has violations that are serious, repeated, willful, or pervasive; but the Department also advises that the subcontractor has taken sufficient action to remediate its violations, such as through its own remedial measures, by entering into a labor compliance agreement, or by agreeing to enter into such an agreement; and the subcontractor has provided notice of this advice to the contractor. *See* FAR 52.222–59(c)(4)(ii)(C)(*2*).

4. The Department Has Failed To Provide Timely Advice

If the Department does not provide advice to the subcontractor within 3 business days of the subcontractor's detailed disclosure of Labor Law decision information, and the Department did not previously advise the subcontractor that it needed to enter into a labor compliance agreement, then the contractor may proceed with making a responsibility determination using available information and business judgment. *See* FAR 52.222–59(c)(6).

5. The Subcontractor Contests Negative Advice From the Department

Where the subcontractor contests negative advice from the Department, the contractor may still find the subcontractor has a satisfactory record under certain conditions. If the subcontractor disagrees with negative advice from the Department, then the subcontractor must provide the contractor with (i) information about all the Labor Law violations that have been determined by the Department to be serious, repeated, willful, and/or pervasive; (ii) such additional information that the subcontractor deems necessary to demonstrate its responsibility, including mitigating factors, remedial measures such as subcontractor actions taken to address the Labor Law violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws; (iii) a description of the Department's advice or proposed labor compliance agreement; and (iv) an explanation of the basis for the subcontractor's disagreement with the Department. *See* FAR 52.222–59(c)(4)(ii)(C)(*3*). If the contractor determines that the subcontractor is responsible on the basis of this representation, or if the contractor determines that due to a compelling reason the contractor must proceed with the subcontract award, then the contractor must notify the contracting officer of the decision and provide the name of the subcontractor and the basis for the decision (*e.g.,* urgent and compelling circumstances). *See id.* 52.222–59(c)(5).

D. Semiannual Subcontractor Updates

Subcontractors must update their Labor Law decision disclosures after a subcontract award in the same manner that prime contractors must do for a prime contract award. *See* FAR 22.2004–1(b); 22.2004–4. Subcontractors must determine, semiannually, whether the Labor Law disclosures that the subcontractor previously provided to the Department are current and complete. *Id.* 52.222–59(d)(1). If the information is current and complete, no action is required. *Id.* If the information is not current and complete, subcontractors must provide revised information to the Department and then make a new representation to the contractor. *Id.* 52.222–59(d)(1).

If a subcontractor discloses new information about Labor Law decisions to the Department, the subcontractor must provide to the contractor any new advice from the Department. *See* FAR 52.222–59(d)(1). In addition, the subcontractor must disclose to the contractor if, during the course of performance of the contract, the Department notifies the subcontractor that it has not entered into a labor compliance agreement in a reasonable period or is not meeting the terms of a labor compliance agreement. *Id.* 52.222–59(d)(2).

When a subcontractor discloses new Department advice or new information about Labor Law decisions, the contractor must determine whether action is necessary. *See* FAR 52.222–59(d)(3). If the contractor decides to continue the subcontract notwithstanding negative Department advice, the contractor must notify the contracting officer of the decision and provide the name of the subcontractor and the basis for the decision (*e.g.,* urgent and compelling circumstances). *Id.* 52.222–59(d)(4).

VI. Preassessment

Prior to bidding on a contract, prospective contractors and subcontractors are encouraged to voluntarily contact the Department to request an assessment of their record of Labor Law compliance. The Department will assess whether any of the prospective contractor's violations are serious, repeated, willful, and/or pervasive; and whether a labor compliance agreement may be warranted. If a contractor that has been assessed by the Department subsequently submits a bid, and the contracting officer initiates a responsibility determination for the contractor, the contracting officer and the ALCA may rely on the Department's assessment that the contractor has a satisfactory record of Labor Law compliance unless additional Labor Law decisions have been disclosed.

Contact information and additional guidance regarding the preassessment program can be found at *http://www.dol.gov/fairpayandsafeworkplaces.*

VII. Paycheck Transparency

Transparency in the relationships between employers and their workers is critical to workers' understanding of their legal rights and to the resolution of workplace disputes. When workers lack information about how their pay is calculated and their status as employees or independent contractors, workers are less aware of their rights and employers are less likely to comply with labor laws. Providing workers with information about how their pay is calculated each pay period will enable workers to raise any concerns about pay more quickly, and will encourage proactive efforts by employers to resolve such concerns. Similarly, providing workers who are classified as independent contractors with notice of their status will enable them to better understand their legal rights, evaluate their status as independent contractors, and raise any concerns during the course of the working relationship as opposed to after it ends (which will increase the likelihood that the employer and the worker will be able to resolve any concerns more quickly and effectively).

The Order seeks to improve paycheck transparency for covered workers on Federal contracts by instructing contracting officers to insert the contract clause at FAR 52.222–60. *See* Order, section 5; FAR 22.2007(d). This clause requires contractors to provide wage statements and notice of any independent contractor relationship to their covered workers, and this clause's requirements flow down and apply to covered workers of subcontractors regardless of tier. *See* Order, section 5; FAR 52.222–60.

A. Wage Statement

The Order requires contracting agencies to ensure that, for covered procurement contracts, provisions in solicitations and clauses in contracts require contractors to provide most workers under the contract with a "document" each pay period with "information concerning that individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay." Order, section 5(a). Contracting agencies also must ensure that contractors "incorporate this same requirement" into covered subcontracts at all tiers. *Id.*

The Order requires that the wage statement be provided to "all individuals performing work" for whom the contractor or subcontractor is required to maintain wage records under the FLSA, the DBA, or the SCA. Order, section 5(a).[118] This means that a wage statement must be provided to every worker subject to any of those laws regardless of the classification of the worker as an employee or independent contractor.

The Order states that the wage statement provided to workers each pay period must be a "document." Order, section 5(a). If the contractor or subcontractor regularly provides documents to its workers by electronic means, the wage statement may be provided electronically if the worker can access it through a computer, device, system, or network provided or made available by the contractor. FAR 52.222–60.

The Order further provides that the wage statement must be issued every pay period and contain the total number of hours worked in the pay period and the number of those hours that were overtime hours. Order, section 5(a). The FAR requires that if the wage statement is not provided weekly and is instead provided bi-weekly or semi-monthly (because the pay period is bi-weekly or semi-monthly), then the hours worked and overtime hours contained in the wage statement must be broken down to correspond to the period (which will almost always be weekly) for which overtime is calculated and paid. *See* FAR 52.222–60. If the hours worked and overtime hours are aggregated in the wage statement for the entire pay period as opposed to being broken down by week, the worker may not be able to understand and evaluate how the overtime hours were calculated. For example, if the pay period is bi-weekly and the worker is entitled to overtime pay for hours worked over 40 in a week, then the wage statement must provide the hours worked and any overtime hours for the first week and the hours worked and any overtime hours for the second week.

The FAR requires that the wage statement contain the worker's rate of pay, which provides workers with vital information about how their gross pay is calculated. *See* FAR 52.222–60. The rate of pay will most often be the worker's regular hourly rate of pay. If the worker is not paid by the hour, the rate of pay information should reflect the basis of pay by indicating the monetary amount paid on a per day, per week, per piece, or other basis. The FAR also requires that the wage statement contain the gross pay and itemize or identify each addition to or deduction from gross pay. *Id.* Additions to pay may include bonuses, awards, and shift differentials. Deductions from pay include deductions required by law (such as withholding for taxes), voluntary deductions by the worker (such as contributions to health insurance premiums or retirement accounts), and all other deductions or reductions made from gross pay regardless of the reason. Itemizing the additions to and deductions from gross pay means that each addition and deduction must be separately listed and the specific amount added or deducted must be identified (lump sums are insufficient). Providing a worker with the gross pay and itemized additions to and deductions from gross pay allows the worker to understand the net pay received and how it was calculated.

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[118] The Order also requires the provision of a wage-statement document to all workers for whom records must be retained under any State laws "equivalent" to the FLSA, DBA, or SCA. *See* Order, section 5(a). As noted above in section II(B), this Guidance does not include a list of State laws equivalent to the FLSA, the DBA, and the SCA. The list of equivalent State laws will be included in future guidance issued by the Department.

In sum, the FAR requires that wage statements contain the following information: (1) Hours worked, (2) overtime hours, (3) rate of pay, (4) gross pay, and (5) an itemization of each addition to and deduction from gross pay. FAR 52.222–60.[119]

As specified in the FAR, if a significant portion of the contractor's or subcontractor's workforce is not fluent in English, the wage statement must also be in the language(s) other than English in which the significant portion(s) of the workforce is fluent. FAR 52.222–60.

The wage statement provided to workers who are exempt from overtime pay under the FLSA "need not include a record of hours worked if the contractor informs the individuals of their exempt status." Order, section 5(a).[120] To sufficiently inform a worker of exempt status so that the wage statement need not include hours worked, the contractor or subcontractor must provide written notice to the worker stating that the worker is exempt from the FLSA's overtime compensation requirements; oral notice is not sufficient. *See* FAR 52.222–60. The notice can be a stand-alone document or can be included in the offer letter, employment contract, or position description, or wage statement—as long as the document is provided to the worker. *See id.*[121] The notice must be provided either before the worker starts work on the contract or in the worker's first wage statement under the contract. *See id.* If during contract performance, the contractor or subcontractor determines that the worker's status has changed from non-exempt to exempt, it must provide notice to the worker prior to providing a wage statement without hours worked information or in the first wage statement after the change. *See id.* If the contractor or subcontractor regularly provides documents to its workers by electronic means, the document may be provided electronically if the worker can access it through a computer, device, system, or network provided or made available by the contractor or subcontractor. *Id.*

The Department and courts determine whether a worker is exempt from the FLSA's overtime requirement. The fact that a contractor or subcontractor has provided a worker with notice that he or she is exempt does not mean that the worker is correctly classified. The Department will not consider the notice when determining whether a worker is exempt. A contractor or subcontractor may not in its exempt-status notice to a worker indicate or suggest that the Department or the courts agree with the determination that the worker is exempt. FAR 52.222–60.

The wage-statement requirements "shall be deemed to be fulfilled" where a contractor "is complying with State or local requirements that the Secretary of Labor has determined are substantially similar to those required" by the Order. Order, section 5(a). The Secretary has determined that the following States and localities have "substantially similar" wage-statement requirements as the Order: Alaska, California, Connecticut, the District of Columbia, Hawaii, New York, and Oregon. The wage-statement requirements of these States and the District of Columbia are substantially similar because they require employers to provide wage statements that include at least the worker's overtime hours or overtime earnings, total hours, gross pay, and any additions or deductions from gross pay. Providing a worker in one of the Substantially Similar Wage Payment States with a wage statement that complies with the requirements of that State or locality satisfies the Order's wage-statement requirement. *See* FAR 52.222–60. In addition, a contractor satisfies the Order's wage-statement requirement by adopting the wage-statement requirements of any particular Substantially Similar Wage Payment State in which the contractor has workers and providing a wage statement that complies with the requirements of that State or locality to all of its workers.

The Department maintains on its Web site (*http://www.dol.gov/fairpayandsafeworkplaces*) a list of the Substantially Similar Wage Payment States. The Secretary recognizes that States and localities may change their wage-statement laws so that their requirements may or may not be substantially similar to the Order's wage-statement requirement. When the Secretary determines that a State or locality must be added to or removed from the list of Substantially Similar Wage Payment States, notice of such changes will be published on the Web site. The Department may also issue All Agency Memoranda or similar direction to contracting agencies and the public to communicate updates to the list of the Substantially Similar Wage Payment States.

B. Independent Contractor Notice

The Order requires contractors who treat individuals performing work for them (on covered procurement contracts) as independent contractors to provide each such worker with a document informing him or her of this independent contractor status. *See* Order, section 5(b). Contracting agencies must require that contractors incorporate this same requirement into covered subcontracts. *See* FAR 52.222–60.

The FAR requires contractors and subcontractors to provide the notice informing the worker of status as an independent contractor to each individual worker treated as an independent contractor. *See* FAR 52.222–60. The notice must be a "document"; oral notice of independent contractor status is not sufficient.[122] *Id.* The document must be separate from any independent contractor agreement entered into with the individual. *Id.* If the contractor regularly provides documents to its workers by electronic means, the document may be provided electronically if the worker can access it through a computer, device, system, or network provided or made available by the contractor. *See id.* 52.222–60.

The notice must be provided at the time that an independent contractor relationship is established with the worker or before he or she performs any work under the contract. *See* FAR 52.222–60. The notice must be provided each time a worker begins work on a different covered contract, regardless of whether the worker already performs the same type of work on another covered contract. *See id.* If the contractor or subcontractor determines during performance of a covered contract that a worker's status has changed from employee to independent contractor, it must provide the worker with notice of independent contractor status before the worker performs any work under the contract as an independent contractor. *See id.*

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[119] Nothing prohibits the inclusion of more information in the wage statement (*e.g.*, exempt status notification, overtime pay rate). Neither the Order nor the FAR preempts State laws or local ordinances that require more information to be included in the wage statement.

[120] Generally, non-exempt workers are entitled to overtime under the FLSA when they work over 40 hours in a week. *See* 29 U.S.C. 207(a). However, certain workers (such as nurses, firefighters, and police officers) may instead be entitled to overtime under terms other than the 40-hour workweek. *See, e.g.*, 29 U.S.C. 207(j), (k). Such workers are not exempt from the FLSA's overtime requirements; wage statements provided to them must contain a record of hours worked.

[121] As specified in the FAR, if a significant portion of the contractor's workforce is not fluent in English, the document notifying the worker of exempt status must also be in the language(s) other than English in which the significant portion(s) of the workforce is fluent. *See* FAR 52.222–60(e)(1).

[122] As specified in the FAR, if a significant portion of the contractor's or subcontractor's workforce is not fluent in English, the document notifying the worker of independent contractor status must also be in the language(s) other than English with which the significant portion(s) of the workforce is fluent. *See* FAR 52.222–60(e)(1).

Enforcement agencies and courts determine whether a worker is an independent contractor under applicable laws. A contractor may not in its notice to a worker indicate or suggest that any enforcement agency or court agrees with the contractor's determination that the worker is an independent contractor. *See* FAR 52.222–60. The fact that a contractor has provided a worker with notice that he or she is an independent contractor does not mean that the worker is correctly classified as an independent contractor. For example, the Department would not consider the notice when determining whether a worker is an independent contractor or employee during an investigation regarding the contractor's compliance with the FLSA. The determination of whether a worker is an independent contractor under a particular law remains governed by that law's definition of "employee" and that law's standards for determining which workers are independent contractors and not employees.

VIII. Effective Date and Phase-In of Requirements

The FAR rule is effective October 25, 2016. However, several of the requirements are not immediately applicable and are being phased in over the course of the following year. This phase in of the requirements is intended to allow the Government, contractors, subcontractors, and, particularly, small business contractors and subcontractors to prepare for and adapt to the requirements.

A. General Effect of Solicitation Provisions and Contract Clauses

The Order's prime-contractor disclosure, subcontractor disclosure, and paycheck-transparency requirements are implemented through solicitation provisions and contract clauses in covered contracts. *See* FAR 22.2007. This means that contractors and subcontractors performing on contracts awarded prior to the effective date of the rule (or of specific requirements) will not be required to make the disclosures or to provide workers with wage statements and independent contractor notices—even after the effective date of the rule. In other words, the Order's requirements are not retroactive. Rather, these requirements only become effective when the solicitation provisions are included in a new solicitation and the contract clauses are included in a new contract.

B. Contractor Disclosure

From October 25, 2016 to April 24, 2017, the Order's prime-contractor disclosure requirements will apply only to solicitations from contracting agencies with an estimated value of $50 million or more, and resultant contracts. FAR 22.2007(a) and (c)(1). After April 24, 2017, the requirements will apply to solicitations greater than $500,000—which is the amount specified in the Order—and resultant contracts. *Id.* 22.2007(a) and (c)(2); Order, section 2(a). This also applies to the commercial items equivalent for prime contractors, at FAR 52.212–3(s).

C. Subcontractor Disclosure

The subcontractor disclosure provisions described in section V of this Guidance are not effective for the first year of operation of the FAR rule implementing the Order. Thus, while the rule overall is effective on October 25, 2016, the subcontractor disclosure provisions are not effective until October 25, 2017. *See* FAR 22.2007(b)–(c), 52.222–59(c)(1). During this first year before the effective date, prospective subcontractors are encouraged to voluntarily contact the Department to request an assessment of their record of Labor Law compliance. See above section VI (Preassessment).

D. Phase-In of 3-Year Disclosure Period

The general rule under the Order is that contractors and subcontractors must disclose Labor Law decisions that were rendered against them within the 3-year period prior to the date of the disclosure. *See* Sections II(B) and V(A)(1). This 3-year disclosure period is being phased in during the first years of the implementation of the Order, so that no contractor or subcontractor need disclose any Labor Law decisions that were rendered against them prior to October 25, 2015. As the FAR states, contractors and subcontractors must make disclosures for Labor Law decisions rendered against them during the period beginning on October 25, 2015 to the date of the offer, or for 3 years preceding the date of the offer, whichever period is shorter. *See* FAR 52.222–57(c)(1)–(2); 52.222–58(b). Thus, full implementation of the 3-year disclosure period will be reached as of October 25, 2018.

E. Equivalent State Laws

The Order requires disclosure of violations of the 14 Federal statutes and Executive orders, and also of violations of equivalent State laws defined in guidance issued by the Department. Order, section 2(a)(i)(O). As noted above, in section II(B) of this Guidance, the Department has determined that OSHA-approved State Plans are the only equivalent State laws for the purpose of the Order at this time.

In future guidance, published in the **Federal Register**, the Department will identify additional equivalent State laws. Until this subsequent guidance and a subsequent FAR amendment are published, contractors and subcontractors are not required by Order to disclose violations of State laws other than the OSHA-approved State Plans.

F. Paycheck Transparency Provisions

The paycheck transparency provisions described in section VII of this Guidance are not effective until January 1, 2017. *See* FAR 22.2007(d).

Signed this 10th day of August, 2016.

Christopher P. Lu,

Deputy Secretary, U.S. Department of Labor.

Guidance for Executive Order 13673, "Fair Pay Safe Workplaces"
Appendix A: Serious Violations

All violations of Federal labor laws are a serious matter, but in the context of Executive Order 13673, Fair Pay and Safe Workplaces, the Department of Labor has identified certain violations as "serious," "repeated," "willful," and "pervasive." This subset of all Labor Law violations represents the violations that are most concerning and bear on the assessment of a contractor's integrity and business ethics. The Department has purposely excluded from consideration violations that could be characterized as inadvertent or minimally impactful. Ultimately, each contractor's disclosed violations of Labor Laws will be assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractor, and any mitigating factors. In most cases, even for violations subject to disclosure and consideration under the Order, a single violation of one of the Labor Laws will not give rise to a determination of lack of responsibility.

The chart below includes a non-exhaustive list of examples of Labor Law violations that may be found to be "serious" under the Department's Guidance for Executive Order 13673. **These are examples only: they are not minimum requirements, nor are they exclusive of other violations under each Labor Law that may be serious.** The chart does not include violations of "equivalent State laws," which are also covered by the Order, but (with the exception of OSHA State Plans, which are addressed in the current Guidance) will be addressed in future guidance. Where the chart indicates that a violation is serious for more than one reason, this means that *either* of the reasons listed is an *independent* ground for finding that the violation is serious, as defined in the Guidance.

Summary of Definition of "Serious Violation"

The full definition of a "serious violation" is set forth in section III(A)(1) of the Department of Labor's Guidance. When assessing violations, Agency Labor Compliance Advisors (ALCAs) should refer to the full definition in the Guidance.

In summary, the Guidance provides that a violation of one of the Labor Laws is serious under the following circumstances:

a. For OSH Act or OSHA-approved State Plan violations that are enforced through citations or equivalent State documents, a violation is serious if a citation, or equivalent State document, was designated as serious or an equivalent State designation.

b. For all other violations of the Labor Laws, a violation is serious if it is readily ascertainable from the Labor Law decision that the violation involved any one of the following:
   i. The violation affected at least 10 workers, and the affected workers made up 25 percent or more of the contractor's workforce at the worksite or 25 percent or more of the contractor's workforce overall;
   ii. Fines and penalties of at least $5,000 or back wages of at least $10,000 were due;
   iii. The contractor's conduct caused or contributed to the death or serious injury of one or more workers;
   iv. The contractor employed a minor who was too young to be legally employed or in violation of a Hazardous Occupations Order;

v. The contractor was issued a notice of failure to abate an OSH Act or OSHA-approved State Plan violation; or the contractor was issued an imminent danger notice or an equivalent State notice under the OSH Act or an OSHA-approved State Plan.

vi. The contractor retaliated against one or more workers for exercising any right protected by any of the Labor Laws;

vii. The contractor engaged in a pattern or practice of discrimination or systemic discrimination;

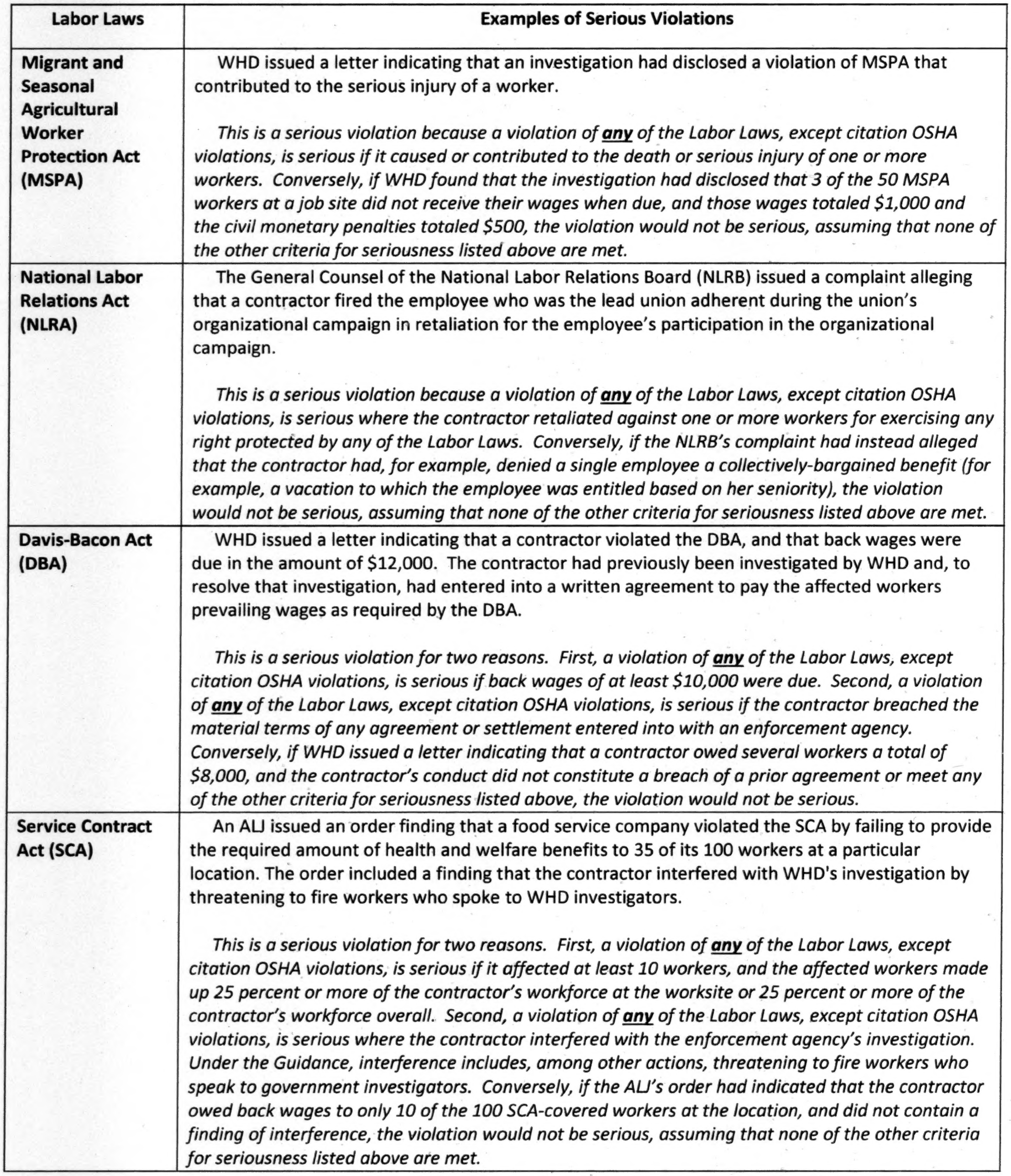
viii. The contractor interfered with the enforcement agency's investigation; or

ix. The contractor breached the material terms of any agreement or settlement entered into with an enforcement agency, or violated any court order, any administrative order by an enforcement agency, or any arbitral award.

When assessing Labor Law violations, ALCAs will review all of the above criteria to determine whether a violation is serious. The examples below are intended to illustrate how these criteria may arise in different contexts, but a violation will be serious if it meets **any** of the above criteria.

ALCAs will classify violations based on information that is readily ascertainable from the Labor Law decisions themselves. They do not second-guess or re-litigate enforcement actions or the decisions of reviewing officials, courts, and arbitrators. While ALCAs and contracting officers may seek additional information from the enforcement agencies to provide context, they generally rely on the information contained in the Labor Law decisions to determine whether violations are serious, repeated, willful, or pervasive under the definitions provided in this Guidance.

Labor Laws	Examples of Serious Violations
Fair Labor Standards Act (FLSA)	The Wage and Hour Division of DOL (WHD) found that a contractor violated the minimum wage and overtime provisions of the FLSA. It issued the contractor a Form WH-56 "Summary of Unpaid Wages," and also assessed civil monetary penalties. The back wages due totaled $75,000, and the civil monetary penalties assessed totaled $6,000. *This is a serious violation for two reasons. First, a violation of* ***any*** *of the Labor Laws, except OSH Act and OSHA-approved State Plan violations enforced through citations or equivalent State documents ("citation OSHA violations"), is serious if fines and penalties of at least $5,000 were due. Second, a violation of* ***any*** *of the Labor Laws, except citation OSHA violations, is serious if back wages of at least $10,000 were due. Conversely, if the back wages due totaled less than $10,000* ***and*** *the civil monetary penalties assessed had totaled less than $5,000, the violation would not be a serious violation, assuming that none of the other criteria for seriousness listed above are met.* WHD finds that a meat processor employed 10 workers under the age of 18 to operate power-driven meat processing machines, such as slicers, saws, and choppers. One of these workers died in an accident involving one of the machines. *This is a serious violation for two reasons. First, a violation of FLSA's child labor provisions is serious if the contractor employed a minor too young to be legally employed or in violation of a Hazardous Occupations Order. The employment of minors in the above-described occupation is prohibited under Hazardous Occupation Order No. 10. Second, a violation of* ***any*** *of the Labor Laws, except citation OSHA violations, is serious if the contractor's conduct causes or contributes to the death or serious injury of one or more workers. Conversely, the employment of, for example, a 14 or 15 year-old minor in excess of 3 hours outside school hours on a school day in a non-hazardous, non-agricultural job in which the child is otherwise permitted to work would not be a serious violation, assuming that none of the other criteria for seriousness listed above are met.*
Occupational Safety and Health (OSH) Act	OSHA issued a citation for failing to protect against fall hazards on a construction worksite. The citation was designated as "serious." *This is a serious violation because all citations or equivalent State documents designated by OSHA or an OSHA-approved State Plan as serious or an equivalent State designation are serious under the Order. Conversely, if the citation had been designated as "other-than-serious," it would not be a serious violation under the Order.* A few months after OSHA issued the above citation, it inspects the worksite again and finds that the contractor failed to remedy the fall hazards as required. Accordingly, OSHA issues a notice of failure to abate and assesses additional penalties. *This is a serious violation because a notice of failure to abate a violation under the OSH Act or an OSHA-approved State Plan is classified as a serious violation under the Order.*



Labor Laws	Examples of Serious Violations
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	WHD issued a letter indicating that an investigation had disclosed a violation of MSPA that contributed to the serious injury of a worker. *This is a serious violation because a violation of* ***any*** *of the Labor Laws, except citation OSHA violations, is serious if it caused or contributed to the death or serious injury of one or more workers. Conversely, if WHD found that the investigation had disclosed that 3 of the 50 MSPA workers at a job site did not receive their wages when due, and those wages totaled $1,000 and the civil monetary penalties totaled $500, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.*
National Labor Relations Act (NLRA)	The General Counsel of the National Labor Relations Board (NLRB) issued a complaint alleging that a contractor fired the employee who was the lead union adherent during the union's organizational campaign in retaliation for the employee's participation in the organizational campaign. *This is a serious violation because a violation of* ***any*** *of the Labor Laws, except citation OSHA violations, is serious where the contractor retaliated against one or more workers for exercising any right protected by any of the Labor Laws. Conversely, if the NLRB's complaint had instead alleged that the contractor had, for example, denied a single employee a collectively-bargained benefit (for example, a vacation to which the employee was entitled based on her seniority), the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.*
Davis-Bacon Act (DBA)	WHD issued a letter indicating that a contractor violated the DBA, and that back wages were due in the amount of $12,000. The contractor had previously been investigated by WHD and, to resolve that investigation, had entered into a written agreement to pay the affected workers prevailing wages as required by the DBA. *This is a serious violation for two reasons. First, a violation of* ***any*** *of the Labor Laws, except citation OSHA violations, is serious if back wages of at least $10,000 were due. Second, a violation of* ***any*** *of the Labor Laws, except citation OSHA violations, is serious if the contractor breached the material terms of any agreement or settlement entered into with an enforcement agency. Conversely, if WHD issued a letter indicating that a contractor owed several workers a total of $8,000, and the contractor's conduct did not constitute a breach of a prior agreement or meet any of the other criteria for seriousness listed above, the violation would not be serious.*
Service Contract Act (SCA)	An ALJ issued an order finding that a food service company violated the SCA by failing to provide the required amount of health and welfare benefits to 35 of its 100 workers at a particular location. The order included a finding that the contractor interfered with WHD's investigation by threatening to fire workers who spoke to WHD investigators. *This is a serious violation for two reasons. First, a violation of* ***any*** *of the Labor Laws, except citation OSHA violations, is serious if it affected at least 10 workers, and the affected workers made up 25 percent or more of the contractor's workforce at the worksite or 25 percent or more of the contractor's workforce overall. Second, a violation of* ***any*** *of the Labor Laws, except citation OSHA violations, is serious where the contractor interfered with the enforcement agency's investigation. Under the Guidance, interference includes, among other actions, threatening to fire workers who speak to government investigators. Conversely, if the ALJ's order had indicated that the contractor owed back wages to only 10 of the 100 SCA-covered workers at the location, and did not contain a finding of interference, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.*

Labor Laws	Examples of Serious Violations
Executive Order 11246 (Equal Employment Opportunity)	OFCCP issued a show cause notice indicating that an investigation had disclosed that a contractor had systemically discriminated against African-American and Hispanic job seekers in violation of EO 11246. OFCCP had determined that back wages were due to job applicants in an amount upwards of $100,000. The contractor subsequently settled the case with OFCCP for a total of $75,000 in back wages. *This is a serious violation for two reasons. First, a violation of **any** of the Labor Laws, except citation OSHA violations, is serious if the contractor engaged in a pattern or practice of discrimination or systemic discrimination. Second, a violation of **any** of the Labor Laws, except citation OSHA violations, is serious if back wages of at least $10,000 were due. Conversely, if OFCCP issued a show cause notice indicating that the investigation disclosed that the contractor had discriminated against only a few such job seekers, and the amount of back wages due was only $9,000, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.*
Section 503 of the Rehabilitation Act	The ARB affirmed an ALJ order directing a contractor to change a practice of medical screenings that discriminated against job applicants with disabilities—and were not job-related or consistent with business necessity—in violation of section 503. *This is a serious violation because a violation of **any** of the Labor Laws, except citation OSHA violations, is serious if the contractor engaged in a pattern or practice of discrimination or systemic discrimination. Conversely, if the ARB had found that the contractor's practice of medical screenings was generally not discriminatory, but that the contractor had discriminated against two specific disabled job applicants in another fashion, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.*
Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)	OFCCP issued a show cause notice indicating that an investigation had disclosed that a contractor had discriminated against a protected veteran job applicant, and that back wages were due to the job applicant in an amount upwards of $10,000. *This is a serious violation because a violation of **any** of the Labor Laws, except citation OSHA violations, is serious if back wages of at least $10,000 were due. Conversely, if OFCCP had determined that the job applicant was due only $5,000 in back wages, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.*
Family and Medical Leave Act (FMLA)	WHD issued a Form WH-56 indicating that a contractor had violated the FMLA and, as a result, owed $12,000 in back wages. *This is a serious violation because a violation of **any** of the Labor Laws, except citation OSHA violations, is serious if back wages of at least $10,000 were due. Conversely, had WHD determined that the contractor owed only $8,000 in back wages, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.*
Title VII of the Civil Rights Act of 1964	The EEOC filed a complaint in Federal court after an investigation found that the contractor engaged in a pattern or practice of discrimination under Title VII. *This is a serious violation because a violation of **any** of the Labor Laws, except citation OSHA violations, is serious if the contractor engaged in a pattern or practice of discrimination or systemic discrimination. Conversely, had the EEOC's complaint alleged that the contractor discriminated against only a single individual, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.*

Labor Laws	Examples of Serious Violations
Americans with Disabilities Act of 1990 (ADA)	In a private action under the ADA brought in Federal district court, the court issued a judgment in favor of the plaintiff, relying in part on adverse inferences against the defendant because the defendant had destroyed relevant records in an attempt to undermine an EEOC investigation of the violations. *This is a serious violation because a violation of **any** of the Labor Laws, except citation OSHA violations, is serious if the contractor interfered with the enforcement agency's investigation. Under the Guidance, interference includes, among other actions, the destruction of records to frustrate an investigation under the Labor Laws. Conversely, if the contractor had not interfered in this fashion, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.*
Age Discrimination in Employment Act of 1967 (ADEA)	In a private action brought in Federal district court, the factfinder found that the contractor unlawfully discriminated against the plaintiff on the basis of age when it discharged the plaintiff. The court awarded back wages of $50,000 to the plaintiff. *This is a serious violation because a violation of **any** of the Labor Laws, except citation OSHA violations, is serious if back wages of at least $10,000 were due. Conversely, had the court awarded only $8,000 in back wages, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.*
Executive Order 13658 (Minimum Wage for Contractors)	WHD issued an investigative findings letter indicating that an investigation disclosed a violation of Executive Order 13658 and finding that a total of $15,000 in back wages are due. *This is a serious violation because a violation of **any** of the Labor Laws, except citation OSHA violations, is serious if back wages of at least $10,000 were due. Conversely, had WHD's investigative findings letter indicated that only $1,500 in back wages were due, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.*

Guidance for Executive Order 13673, "Fair Pay Safe Workplaces"
Appendix B: Repeated Violations

All violations of Federal labor laws are a serious matter, but in the context of Executive Order 13673, Fair Pay and Safe Workplaces, the Department of Labor has identified certain violations as "serious," "repeated," "willful," and "pervasive." This subset of all Labor Law violations represents the violations that are most concerning and bear on the assessment of a contractor's integrity and business ethics. The Department has purposely excluded from consideration violations that could be characterized as inadvertent or minimally impactful. Ultimately, each contractor's disclosed violations of Labor Laws will be assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractor, and any mitigating factors. In most cases, even for violations subject to disclosure and consideration under the Order, a single violation of one of the Labor Laws will not give rise to a determination of lack of responsibility.

The chart below includes a non-exhaustive list of examples of Labor Law violations that may be found to be "repeated" under the Department's Guidance for Executive Order 13673. **These are examples only: they are not minimum requirements, nor are they exclusive of other violations under each Labor Law that may be repeated.** The chart does not include violations of "equivalent State laws," which are also covered by the Order, but (with the exception of OSHA State Plans, which are addressed in the current Guidance) will be addressed in future guidance.

Summary of Definition of "Repeated Violation"

The full definition of a "repeated violation" is set forth in section III(A)(2) of the Department of Labor's Guidance. When assessing violations, Agency Labor Compliance Advisors (ALCAs) should refer to the full definition in the Guidance.

In summary, a violation is "repeated" under the Order if:

a. For a violation of the OSH Act or an OSHA-approved State Plan that was enforced through a citation or an equivalent State document, the citation at issue was designated as "repeated," "repeat," or any equivalent State designation and the prior violation that formed the basis for the repeated violation became a final order of the OSHRC or equivalent State agency no more than 3 years before the repeated violation;

b. For all other Labor Law violations, the contractor has committed a violation that is the same as or substantially similar to a prior violation of the Labor Laws that was the subject of a separate investigation or proceeding arising from a separate set of facts, and became uncontested or adjudicated within the previous 3 years. The following is an exhaustive list of violations that are substantially similar to each other for these purposes:
   1. For the FLSA:
      i. Any two violations of the FLSA's child labor provisions.
      ii. Any two violations of the FLSA's provision requiring break time for nursing mothers.
   2. For the FLSA, DBA, SCA, and Executive Order 13658:
      i. Any two violations of these statutes' minimum wage, subminimum wage, overtime,

Summary of Definition of "Repeated Violation"

or prevailing wages provisions, even if they arise under different statutes.

3. For the FMLA:
    - i. Any two violations of the FMLA's notice requirements.
    - ii. Any two violations of the FMLA other than its notice requirements.
4. For the MSPA:
    - i. Any two violations of the MSPA's requirements pertaining to wages, supplies, and working arrangements.
    - ii. Any two violations of the MSPA's requirements related to health and safety.
    - iii. Any two violations of the MSPA's disclosure and recordkeeping requirements.
    - iv. Any two violations related to the MSPA's registration requirements.
5. For the NLRA:
    - i. Any two violations of the same numbered subsection of section 8(a) of the NLRA.
6. For Title VII, section 503 of the Rehabilitation Act of 1973, the ADA, the ADEA, section 6(d) of the FLSA (known as the Equal Pay Act, 29 U.S.C. 206(d)), Executive Order 11246 of September 24, 1965, the Vietnam Era Veterans' Readjustment Assistance Act of 1972, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974:
    - i. Any two violations, even if they arise under different statutes, if both violations involve:
        1. the same protected status, and
        2. at least one of the following elements in common:
            - a. the same employment practice, or,
            - b. the same worksite.
7. For all of the Labor Laws, including those listed above, even if the violations arise under different statutes:
    - i. Any two violations involving retaliation;
    - ii. Any two failures to keep records required under the Labor Laws; or
    - iii. Any two failures to post notices required under the Labor Laws.

The Guidance provides further detail on the meaning of "uncontested or adjudicated," how the 3-year look-back period is calculated, what constitutes a "substantially similar" violation, and other aspects of the definition.

When assessing Labor Law violations, ALCAs will review the full definition to determine whether a violation is repeated. The examples below are intended to illustrate how the definition may be applied in different contexts, but a violation can be deemed repeated as long as it meets the criteria set forth in the Guidance.

ALCAs will classify violations based on information that is readily ascertainable from the Labor Law decisions themselves. They do not second-guess or re-litigate enforcement actions or the decisions of reviewing officials, courts, and arbitrators. While ALCAs and contracting officers may seek additional information from the enforcement agencies to provide context, they generally rely on the information contained in the Labor Law decisions to determine whether violations are serious, repeated, willful, or pervasive under the definitions provided in this Guidance.

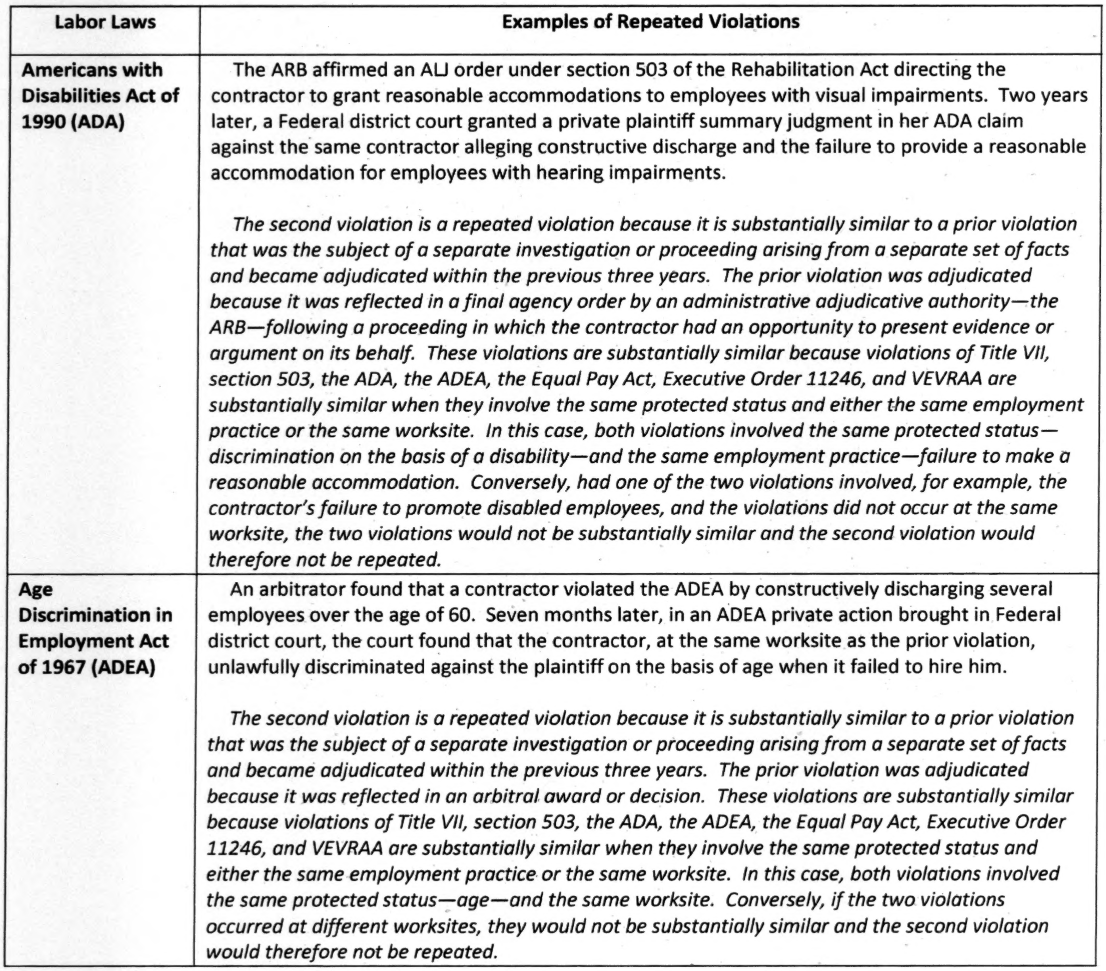
Labor Laws	Examples of Repeated Violations
Fair Labor Standards Act (FLSA)	The Wage and Hour Division (WHD) found that a software company violated overtime provisions of the FLSA after misclassifying employees at one facility as independent contractors. The company did not dispute the violation and agreed to pay back wages by signing a Form WH-56. A year later, the Secretary filed a complaint in Federal court stating that an investigation of a different facility of the same company disclosed violations of the FLSA minimum wage provision. *The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became uncontested within the previous three years. The prior violation was uncontested because the company agreed to at least some of the relief sought by WHD in the enforcement action. Even though the first violation involved overtime and the second involved minimum wage, the violations are substantially similar because any two violations of the minimum wage, subminimum wage, overtime, or prevailing wage provisions of the FLSA, DBA, SCA, and Executive Order 13658 are substantially similar. Conversely, had one of the two violations instead involved, for example, the company's failure to follow the FLSA's requirements to provide break time for nursing mothers, the violations would not be substantially similar and the second violation therefore would not be repeated.*
Occupational Safety and Health (OSH) Act	OSHA issued a citation to a contractor for failing to provide fall protection on a residential construction site. The citation was later affirmed by the Occupational Safety and Health Review Commission (OSHRC). Two years after OSHRC's affirmance of the citation, OSHA issued a second citation against the same contractor for failing to provide fall protection at a commercial construction site, and designated that citation as a "repeat" violation under the OSH Act. *The second violation is a repeated violation because OSHA designated it as a "repeat" violation and the prior violation became a final order of the OSHRC or equivalent State agency no more than three years before the repeated violation. Conversely, if the second citation was not designated as "repeat" by OSHA, or if it occurred more than three years after the first violation became a final order of the OSHRC, it would not be a repeated violation under the Order.*
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	A district court issued an order enjoining a farm labor contractor's practice of requiring workers to purchase goods or services solely from a particular company, in violation of MSPA. Three years later, WHD assessed civil monetary penalties after finding that the farm labor contractor failed to pay MSPA-covered workers their wages when due. *The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in a civil judgment. The violations are substantially similar because, under MSPA, multiple violations of the statute's requirements pertaining to wages, supplies, and working arrangements are substantially similar. (Likewise, under MSPA, any two violations of any of MSPA's requirements related to health and safety are substantially similar to each other. The same is true for any two violations of the statute's disclosure and recordkeeping requirements, or any two violations related to its registration requirements.) Conversely, had the contractor, for example, committed one MSPA violation for requiring workers to purchase goods or services solely from a particular company, and a second MSPA violation for failure to comply with MSPA's transportation safety standards, the violations would not be substantially similar and the second violation therefore would not be repeated.*

Labor Laws	Examples of Repeated Violations
National Labor Relations Act (NLRA)	The National Labor Relations Board (NLRB) issued a decision finding that a contractor violated section 8(a)(3), which prohibits employers from discriminating against employees for engaging in or refusing to engage in union activities, by discharging employees who led a union organizational campaign. Two years later, a Regional Director issued a complaint under section 8(a)(3) against the same contractor at a different location for discharging two union representatives at a plant after they organized a one-day strike to protest low wages. *The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in a final agency order by an administrative adjudicative authority—the NLRB—following a proceeding in which the contractor had an opportunity to present evidence or argument on its behalf. The violations are substantially similar because both involved the same numbered subsection of section 8(a) of the NLRA, section 8(a)(3). Conversely, had one of the two violations been a violation of section 8(a)(2), which prohibits an employer from dominating or interfering with the formation or administration of a labor union through financial support or otherwise—for example, had the contractor offered assistance to one union but not to another during an organizational campaign—the two violations would not be substantially similar and the second violation would therefore not be repeated.*
Davis-Bacon Act (DBA)	A Federal district court granted a preliminary injunction enjoining a contractor from further violations of the overtime provisions of the FLSA. Six months later, WHD sent the contractor a letter finding that the contractor violated the DBA by failing to pay workers at a different worksite their prevailing wages. *The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in a civil judgment. Even though the contractor violated two different Labor Laws, the violations are substantially similar because any two violations of the minimum wage, subminimum wage, overtime, or prevailing wage provisions of the FLSA, DBA, SCA, and Executive Order 13658 are substantially similar. Conversely, had the first violation instead involved, for example, the contractor's failure to provide a reasonable accommodation to an employee with a disability under the ADA, the two violations would not be substantially similar and the second violation would therefore not be repeated.*

Labor Laws	Examples of Repeated Violations
Service Contract Act (SCA)	The Department's Administrative Review Board (ARB) issued an order finding that a contractor failed to pay workers covered by Executive Order 13658 the minimum wage of $10.10 per hour. Ten months later, WHD issued a letter indicating that an investigation disclosed a violation of the SCA because the contractor failed to pay service workers their required amount of fringe benefits. *The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in a final agency order by an administrative adjudicative authority—the ARB—following a proceeding in which the contractor had an opportunity to present evidence or argument on its behalf. Even though the contractor violated two different Labor Laws, the violations are substantially similar because any two violations of the minimum wage, subminimum wage, overtime, or prevailing wage provisions of the FLSA, DBA, SCA, and Executive Order 13658 are substantially similar. Conversely, if the first violation was the subject of a determination by WHD that was pending review by the ARB, the second violation would not be a repeated violation because the first violation would not be adjudicated or uncontested.*
Executive Order 11246 (Equal Employment Opportunity)	An arbitrator found that a contractor created a hostile work environment for African-American workers in violation of Title VII. Two years later, OFCCP issued a show cause notice finding that the same contractor failed to comply with the nondiscrimination requirements of Executive Order 11246 by failing to hire qualified Asian workers. Both violations occurred at the same worksite. *The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in an arbitral award. The violations are substantially similar because violations of Title VII, section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same protected status and either the same employment practice or the same worksite. In this case, both violations involved discrimination on the basis of race, and both occurred at the same worksite. Conversely, if the first violation had instead involved discrimination on the basis of gender, or if the violations did not involve the same worksite or the same employment practice, the two violations would not be substantially similar and the second violation would therefore not be repeated.*

Labor Laws	Examples of Repeated Violations
Section 503 of the Rehabilitation Act	A Federal district court granted a private plaintiff summary judgment in a claim against a contractor under the ADA because the contractor refused to hire a disabled worker who used a wheelchair. A year later, an ALJ directed the same contractor to change a practice of medical screenings that discriminated against job applicants with disabilities in violation of section 503 of the Rehabilitation Act. *The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years . The prior violation was adjudicated because it was reflected in a civil judgment. These violations are substantially similar because violations of Title VII, section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same protected status and either the same employment practice or the same worksite. In this case, both violations involved the same protected status—disability—and the same employment practice—hiring. Conversely, if the first violation had instead involved the contractor's failure to provide a reasonable accommodation of an employee's religious beliefs under Title VII, or if the violations did not involve the same worksite or the same employment practice, the two violations would not be substantially similar and the second violation would therefore not be repeated.*
Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)	The ARB issued an order finding that the contractor violated VEVRAA by discriminating against protected veterans on a company-wide basis during the hiring process. Two years later, in a separate compliance evaluation, OFCCP issued a show cause notice indicating that the same contractor failed, on a company-wide basis, to promote employees who were protected veterans to higher-level positions. *The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in a final agency order by an administrative adjudicative authority—the ARB—following a proceeding in which the contractor had an opportunity to present evidence or argument on its behalf. These violations are substantially similar because violations of Title VII, section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same protected status and either the same employment practice or the same worksite. In this case, both violations involved discrimination on the basis of the same protected status—protected veterans' status—and the same worksite, because any two company-wide violations are considered to involve the same worksite. Conversely, if the first violation had instead involved discrimination on the basis of race under Executive Order 11246, or if the violations did not involve the same worksite or the same employment practice, the two violations would not be substantially similar and the second violation would therefore not be repeated.*

Labor Laws	Examples of Repeated Violations
Family and Medical Leave Act (FMLA)	A court found that a contractor had failed to reinstate an employee to the same or an equivalent position after the employee took FMLA leave. Two years later, the Wage and Hour Division, after an investigation, filed suit against the employer challenging the employer's denial of another employee's request for FMLA leave. *The second violation is repeated because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in a civil judgment. The violations are substantially similar because any two violations of the FMLA other than its notice requirements are substantially similar to each other. Conversely, had the first violation involved the contractor's failure to provide notice to employees of their FMLA rights and the second involved either denial of leave or failure to reinstate an employee, the two violations would not be substantially similar and the second violation would therefore not be repeated.*
Title VII of the Civil Rights Act of 1964	OFCCP issued a show cause notice finding that the contractor violated Executive Order 11246 by systemically paying women at one of its locations less than similarly situated men. The contractor did not contest the show cause notice and agreed to remedy the pay disparities. Four months later, the EEOC issued a letter of determination that reasonable cause existed to believe that the same contractor had paid transgender individuals less than non-transgender individuals at another one of its locations. *The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became uncontested within the previous three years. The prior violation was uncontested because the company agreed to at least some of the relief sought by OFCCP in the enforcement action. These violations are substantially similar because violations of Title VII, section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same protected status and either the same employment practice or the same worksite. Both violations involved the same protected status—discrimination on the basis of gender—because violations involving discrimination on the bases of sex, pregnancy, gender identity (including transgender status), and sex stereotyping are considered to involve the "same" protected status for the purpose of determining whether violations are substantially similar under the Order. The two violations also both involved the same employment practice—pay discrimination. Conversely, if the contractor had challenged the first notice before an ALJ and if the proceeding was still pending at the time of the second violation, the second violation would not be a repeated violation because the first violation would not be adjudicated or uncontested.*



Labor Laws	Examples of Repeated Violations
Americans with Disabilities Act of 1990 (ADA)	The ARB affirmed an ALJ order under section 503 of the Rehabilitation Act directing the contractor to grant reasonable accommodations to employees with visual impairments. Two years later, a Federal district court granted a private plaintiff summary judgment in her ADA claim against the same contractor alleging constructive discharge and the failure to provide a reasonable accommodation for employees with hearing impairments. *The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in a final agency order by an administrative adjudicative authority—the ARB—following a proceeding in which the contractor had an opportunity to present evidence or argument on its behalf. These violations are substantially similar because violations of Title VII, section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same protected status and either the same employment practice or the same worksite. In this case, both violations involved the same protected status—discrimination on the basis of a disability—and the same employment practice—failure to make a reasonable accommodation. Conversely, had one of the two violations involved, for example, the contractor's failure to promote disabled employees, and the violations did not occur at the same worksite, the two violations would not be substantially similar and the second violation would therefore not be repeated.*
Age Discrimination in Employment Act of 1967 (ADEA)	An arbitrator found that a contractor violated the ADEA by constructively discharging several employees over the age of 60. Seven months later, in an ADEA private action brought in Federal district court, the court found that the contractor, at the same worksite as the prior violation, unlawfully discriminated against the plaintiff on the basis of age when it failed to hire him. *The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in an arbitral award or decision. These violations are substantially similar because violations of Title VII, section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same protected status and either the same employment practice or the same worksite. In this case, both violations involved the same protected status—age—and the same worksite. Conversely, if the two violations occurred at different worksites, they would not be substantially similar and the second violation would therefore not be repeated.*

Labor Laws	**Examples of Repeated Violations**
Executive Order 13658 (Minimum Wage for Contractors)	WHD sent a letter to a Federal construction contractor finding that the contractor committed violations of the DBA by failing to pay prevailing wages to its employees. As per 29 CFR 5.11, the letter specified that if the contractor desires a hearing in which to contest these findings, it must respond in writing in a letter postmarked within 30 days. The contractor did not provide any response. A year later, WHD issued an Investigative Findings Letter stating that an investigation disclosed that the same company violated Executive Order 13658 by failing to pay its workers the required minimum wage for Federal contractors. *The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became uncontested within the previous three years. The prior violation was uncontested because the contractor did not contest or challenge the violation within the time frame provided in the letter or otherwise required by law. Even though the contractor violated two different Labor Laws, the violations are substantially similar because any two violations of the minimum wage, subminimum wage, overtime, or prevailing wage provisions of the FLSA, DBA, SCA, and Executive Order 13658 are substantially similar. Conversely, had the first violation involved, for example, the employment of minors contrary to the FLSA's child labor provisions, the two violations would not be substantially similar and the second violation would therefore not be repeated.*

Guidance for Executive Order 13673, "Fair Pay Safe Workplaces"
Appendix C: Willful Violations

All violations of Federal labor laws are a serious matter, but in the context of Executive Order 13673, Fair Pay and Safe Workplaces, the Department of Labor has identified certain violations as "serious," "repeated," "willful," and "pervasive." This subset of all Labor Law violations represents the violations that are most concerning and bear on the assessment of a contractor's integrity and business ethics. The Department has purposely excluded from consideration violations that could be characterized as inadvertent or minimally impactful. Ultimately, each contractor's disclosed violations of Labor Laws will be assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractor, and any mitigating factors. In most cases, even for violations subject to disclosure and consideration under the Order, a single violation of one of the Labor Laws will not give rise to a determination of lack of responsibility.

The chart below includes a non-exhaustive list of examples of Labor Law violations that may be found to be "willful" under the Department's Guidance for Executive Order 13673. **These are examples only: they are not minimum requirements, nor are they exclusive of other violations under each Labor Law that may be willful.** The chart does not include violations of "equivalent State laws," which are also covered by the Order, but (with the exception of OSHA State Plans, which are addressed in the current Guidance) will be addressed in future guidance.

Summary of Definition of "Willful Violation"

The full definition of a "willful violation" is set forth in section III(A)(3) of the Department of Labor's Guidance. When assessing violations, Agency Labor Compliance Advisors (ALCAs) should refer to the full definition in the Guidance.

In summary, the Guidance provides that a violation of one of the Labor Laws is willful if:

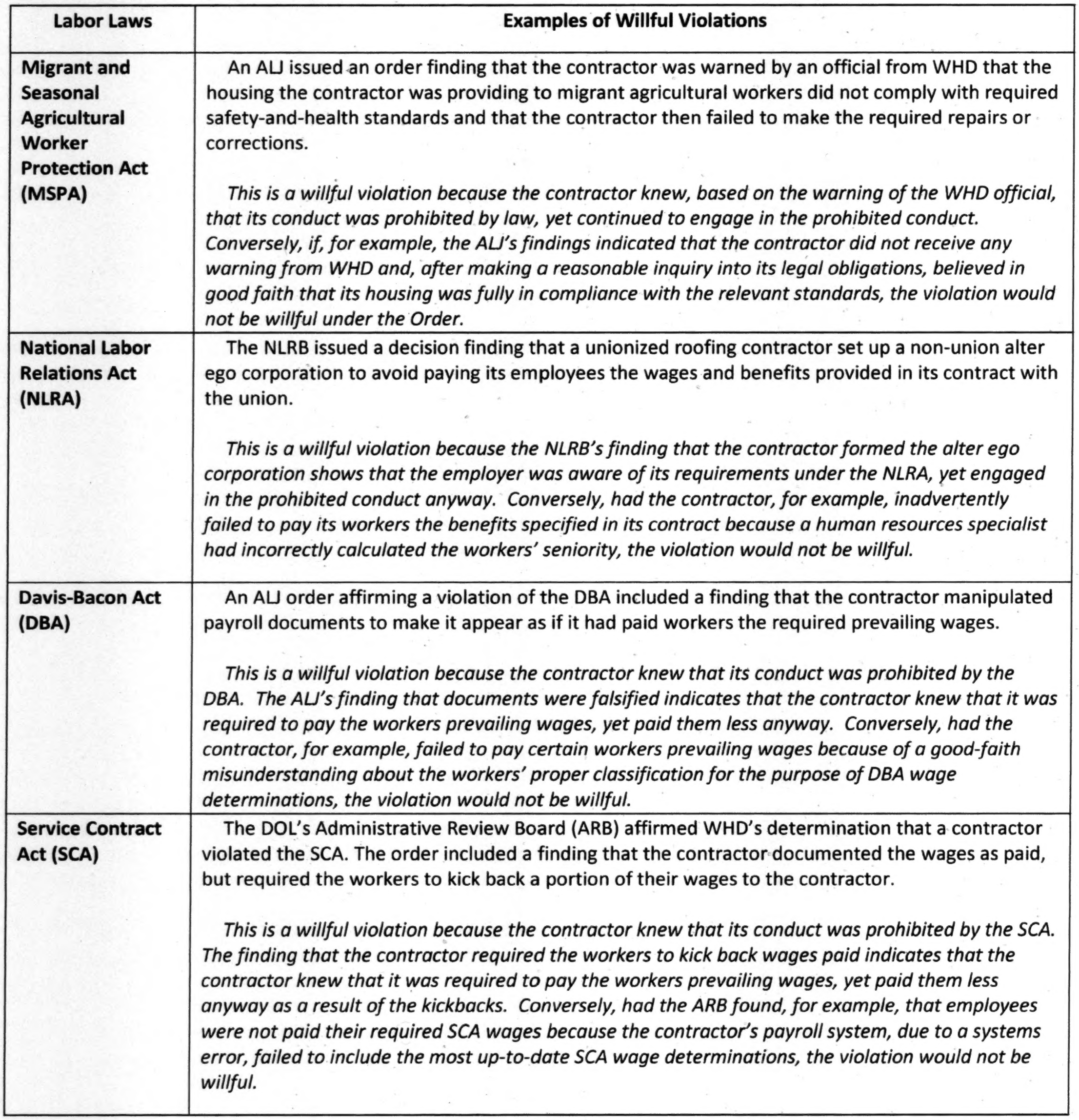
a. For purposes of OSH Act or OSHA-approved State Plan violations that are enforced through citations or equivalent State documents, the citation or equivalent State document at issue was designated as willful or any equivalent State designation (e.g., "knowing");
b. For purposes of the minimum wage, overtime, and child labor provisions of the Fair Labor Standards Act, 29 U.S.C. 206–207, 212, the administrative merits determination sought or assessed back wages for greater than 2 years or sought or assessed civil monetary penalties for a willful violation, or there was a civil judgment or arbitral award or decision finding that the contractor's violation was willful;
c. For purposes of the Age Discrimination in Employment Act, the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded liquidated damages;
d. For purposes of Title VII or the Americans with Disabilities Act, the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual; or
e. For purposes of any other violations of the Labor Laws, it is readily ascertainable from the findings of the relevant enforcement agency, court, arbitrator or arbitral panel that the contractor knew that its conduct was prohibited by any of the Labor Laws or showed reckless disregard for, or acted with plain

indifference to, whether its conduct was prohibited by one or more requirements of the Labor Laws.

When assessing Labor Law violations, ALCAs will review all of the above criteria to determine whether a violation is willful. The examples below are intended to illustrate how these criteria may arise in different contexts, but a violation will be willful if it meets **any** of the above criteria.

ALCAs will classify violations based on information that is readily ascertainable from the Labor Law decisions themselves. They do not second-guess or re-litigate enforcement actions or the decisions of reviewing officials, courts, and arbitrators. While ALCAs and contracting officers may seek additional information from the enforcement agencies to provide context, they generally rely on the information contained in the Labor Law decisions to determine whether violations are serious, repeated, willful, or pervasive under the definitions provided in this Guidance.

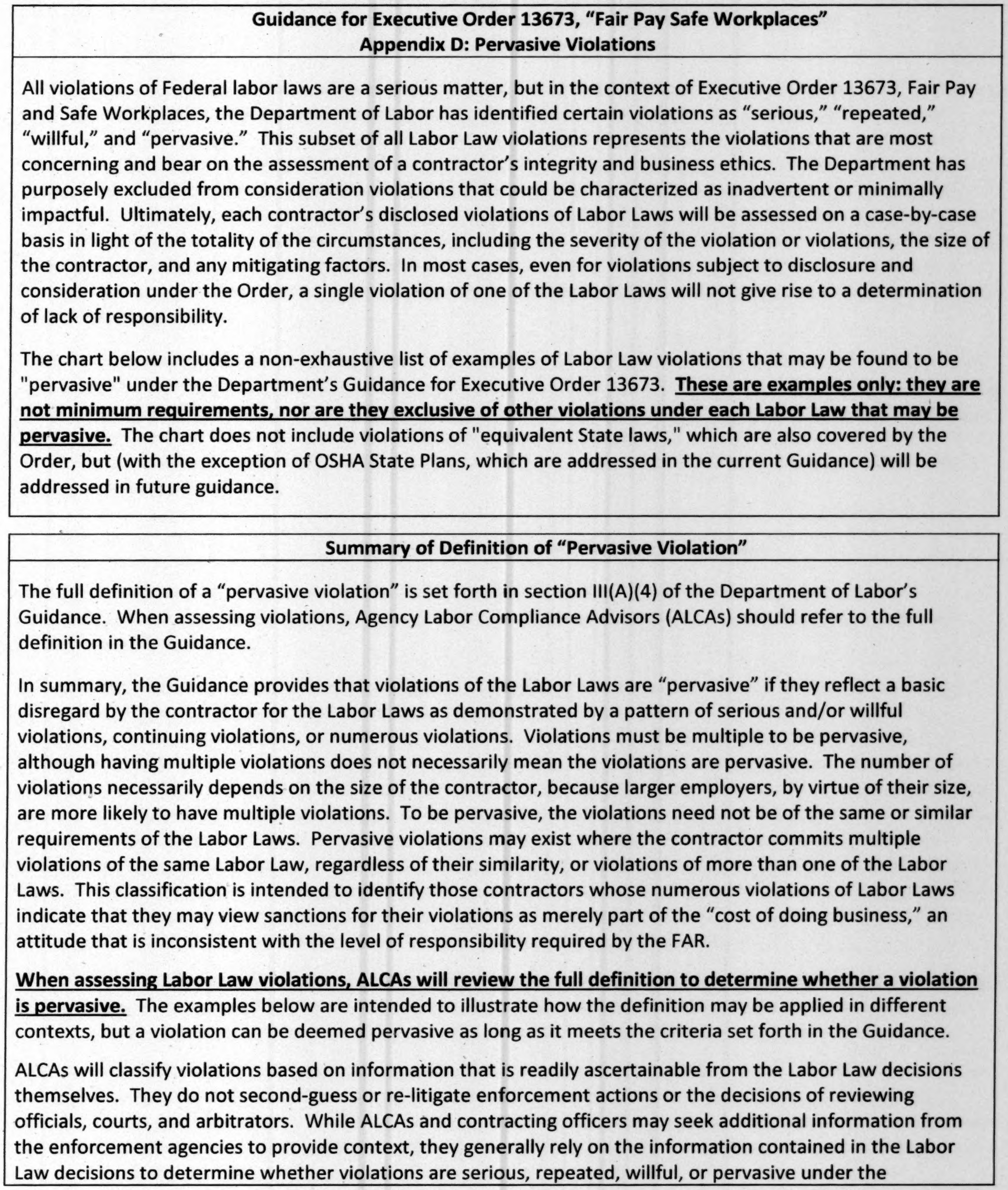
Labor Laws	Examples of Willful Violations
Fair Labor Standards Act (FLSA)	In a private lawsuit under the FLSA, a Federal district court issued an order requiring payment of back wages after finding that a contractor willfully violated the FLSA overtime regulations by paying workers for 40 hours by check and then paying them in cash at a straight-time rate for hours worked over 40. *This is a willful violation because violations of the minimum wage, overtime, and child labor provisions of the FLSA that are reflected in civil judgments or arbitral awards or decisions are willful under the Order if the civil judgment or arbitral award or decision included a finding that the contractor's violation was willful. Conversely, if the court had not found the violation to be willful, the violation would not be willful under the Order.* WHD finds that a contractor employed a 13-year-old child to operate a forklift. In recognition of the contractor's reckless disregard for its obligations under child labor laws, WHD assesses the contractor civil monetary penalties for the violation. *This is a willful violation because violations of the minimum wage, overtime, and child labor provisions of the FLSA are also willful if civil monetary penalties were assessed on the grounds that the violation was willful under the FLSA. Conversely, if, for example, WHD had found that a contractor had inadvertently allowed a 15-year-old, who was about to turn 16 years old, to work as a file clerk during school hours, and WHD did not assess any civil monetary penalties for a willful violation, the violation would not be willful under the Order.*
Occupational Safety and Health (OSH) Act	The Indiana Commissioner of Labor issued a Safety Order finding that a refinery committed a "knowing" violation of the Indiana Occupational Safety and Health Act (an OSHA State Plan) by failing to properly train truck drivers in a propane loading system, which resulted in an explosion. *This is a willful violation because all citations designated as willful by OSHA—or equivalent State documents designated similarly (e.g., as "knowing") by an OSHA State Plan—are willful under the Order. Conversely, had the Safety Order not designated the violation as willful or some other equivalent State designation, the violation would not be willful under the Order.*



Labor Laws	Examples of Willful Violations
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	An ALJ issued an order finding that the contractor was warned by an official from WHD that the housing the contractor was providing to migrant agricultural workers did not comply with required safety-and-health standards and that the contractor then failed to make the required repairs or corrections. *This is a willful violation because the contractor knew, based on the warning of the WHD official, that its conduct was prohibited by law, yet continued to engage in the prohibited conduct. Conversely, if, for example, the ALJ's findings indicated that the contractor did not receive any warning from WHD and, after making a reasonable inquiry into its legal obligations, believed in good faith that its housing was fully in compliance with the relevant standards, the violation would not be willful under the Order.*
National Labor Relations Act (NLRA)	The NLRB issued a decision finding that a unionized roofing contractor set up a non-union alter ego corporation to avoid paying its employees the wages and benefits provided in its contract with the union. *This is a willful violation because the NLRB's finding that the contractor formed the alter ego corporation shows that the employer was aware of its requirements under the NLRA, yet engaged in the prohibited conduct anyway. Conversely, had the contractor, for example, inadvertently failed to pay its workers the benefits specified in its contract because a human resources specialist had incorrectly calculated the workers' seniority, the violation would not be willful.*
Davis-Bacon Act (DBA)	An ALJ order affirming a violation of the DBA included a finding that the contractor manipulated payroll documents to make it appear as if it had paid workers the required prevailing wages. *This is a willful violation because the contractor knew that its conduct was prohibited by the DBA. The ALJ's finding that documents were falsified indicates that the contractor knew that it was required to pay the workers prevailing wages, yet paid them less anyway. Conversely, had the contractor, for example, failed to pay certain workers prevailing wages because of a good-faith misunderstanding about the workers' proper classification for the purpose of DBA wage determinations, the violation would not be willful.*
Service Contract Act (SCA)	The DOL's Administrative Review Board (ARB) affirmed WHD's determination that a contractor violated the SCA. The order included a finding that the contractor documented the wages as paid, but required the workers to kick back a portion of their wages to the contractor. *This is a willful violation because the contractor knew that its conduct was prohibited by the SCA. The finding that the contractor required the workers to kick back wages paid indicates that the contractor knew that it was required to pay the workers prevailing wages, yet paid them less anyway as a result of the kickbacks. Conversely, had the ARB found, for example, that employees were not paid their required SCA wages because the contractor's payroll system, due to a systems error, failed to include the most up-to-date SCA wage determinations, the violation would not be willful.*

Labor Laws	Examples of Willful Violations
Executive Order 11246 (Equal Employment Opportunity)	An ALJ decision found that a contractor's vice president knew that Federal law prohibits discrimination on the basis of gender, but had a policy of not promoting women to managerial positions. *This is a willful violation because the contractor knew that its discrimination was prohibited by law, but engaged in the conduct anyway. Conversely, had the contractor used a neutral procedure for selecting employees for promotion and validated this procedure in accordance with OFCCP regulations, but the procedure was ultimately determined by the ALJ to be discriminatory on the basis of gender because the contractor did not fully comply with validation requirements, the violation would not be willful.*
Section 503 of the Rehabilitation Act	An ARB decision found that a contractor refused to hire any individuals with physical disabilities, and that in doing so, the contractor made no attempt whatsoever to determine whether any of these individuals' disabilities would affect their abilities to do the jobs for which they applied. *This is a willful violation because the contractor made no effort whatsoever to learn or understand whether it was complying with the law, showing that the contractor acted in reckless disregard for its obligations under section 503 of the Rehabilitation Act. Conversely, had the ARB found that the contractor made good-faith efforts to determine whether the applicants' disabilities affected their abilities to do the jobs for which they applied, but submitted insufficient evidence to support its claim that accommodations would impose an undue burden, the violation would not be willful.*
Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)	An ALJ decision finding initial assignment and pay discrimination in violation of VEVRAA found that each time a veteran covered by VEVRAA's protections applied for a job with a contractor, the contractor only placed the veteran in one of its lowest paying custodial jobs without any regard for the veteran's qualifications or the job for which the veteran applied. The decision included a factual finding that the contractor was aware of VEVRAA's prohibition against discriminating against covered veterans, but did so anyway. *This is a willful violation because the contractor knew that its conduct was prohibited by VEVRAA, yet channeled the veterans into the custodial jobs anyway. Conversely, had the contractor used a neutral procedure for selecting employees that the contractor claimed was job-related and consistent with business necessity, but the procedure was ultimately determined by the ALJ to be discriminatory against covered veterans, the violation would not be willful.*
Family and Medical Leave Act (FMLA)	After suit in Federal district court by a private litigant, the court issued a decision that included findings that the contractor's employee handbook provided for unpaid leave to employees with serious health conditions as required by the FMLA, but that the contractor in practice erected unnecessary hurdles to employees requesting such leave. *This is a willful violation because the contractor knew of its requirements under the FMLA, yet violated these requirements. Conversely, had the court's decision instead found that the contractor's actions were based on a good-faith misunderstanding of the FMLA's provisions concerning medical certification, the violation would not be willful.*

Labor Laws	**Examples of Willful Violations**
Title VII of the Civil Rights Act of 1964	After a Federal district court trial finding the contractor liable for sexual harassment, the factfinder assessed punitive damages after finding that the contractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual. The decision included findings that the employer's anti-harassment policy was ineffective and a manager, after receiving a complaint of sexual harassment, failed to report it or investigate it. *This is a willful violation because Title VII violations are willful under the Order if the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual. Conversely, had the district court not awarded any punitive damages, the violation would not be willful.*
Americans with Disabilities Act of 1990 (ADA)	After a trial in Federal court, the factfinder assessed punitive damages after finding that the contractor engaged in an ADA-prohibited discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual, and the contractor could not demonstrate good faith. *This is a willful violation because ADA violations are willful under the Order if the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual. Conversely, had the factfinder not assessed punitive damages, the violation would not be willful.*
Age Discrimination in Employment Act of 1967 (ADEA)	An arbitral award included liquidated damages for a willful violation of the ADEA. *This is a willful violation because ADEA violations are willful under the Order if the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded liquidated damages. Conversely, had the arbitrator not awarded any liquidated damages, the violation would not be willful.*
Executive Order 13658 (Minimum Wage for Contractors)	An ALJ order affirming a violation of Executive Order 13658 included a finding that the employer, an experienced and sophisticated government contractor, made no effort whatsoever to determine what its minimum wage obligations were or whether its workers were employees or independent contractors, but instead chose to pay them a flat rate that fell well short of the requirements of Executive Order 13658. *This is a willful violation because the contractor made no effort whatsoever to learn or understand whether it was complying with the law, showing that that the contractor was acting in reckless disregard or plain indifference of its requirements under Executive Order 13658. Conversely, if the employer in question was a small business and a new Federal contractor and the employer, after reading the regulations implementing Executive Order 13658, mistakenly concluded in good faith that it was not covered by these minimum wage requirements, the violation would not be willful.*



Guidance for Executive Order 13673, "Fair Pay Safe Workplaces"
Appendix D: Pervasive Violations

All violations of Federal labor laws are a serious matter, but in the context of Executive Order 13673, Fair Pay and Safe Workplaces, the Department of Labor has identified certain violations as "serious," "repeated," "willful," and "pervasive." This subset of all Labor Law violations represents the violations that are most concerning and bear on the assessment of a contractor's integrity and business ethics. The Department has purposely excluded from consideration violations that could be characterized as inadvertent or minimally impactful. Ultimately, each contractor's disclosed violations of Labor Laws will be assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractor, and any mitigating factors. In most cases, even for violations subject to disclosure and consideration under the Order, a single violation of one of the Labor Laws will not give rise to a determination of lack of responsibility.

The chart below includes a non-exhaustive list of examples of Labor Law violations that may be found to be "pervasive" under the Department's Guidance for Executive Order 13673. **These are examples only: they are not minimum requirements, nor are they exclusive of other violations under each Labor Law that may be pervasive.** The chart does not include violations of "equivalent State laws," which are also covered by the Order, but (with the exception of OSHA State Plans, which are addressed in the current Guidance) will be addressed in future guidance.

Summary of Definition of "Pervasive Violation"

The full definition of a "pervasive violation" is set forth in section III(A)(4) of the Department of Labor's Guidance. When assessing violations, Agency Labor Compliance Advisors (ALCAs) should refer to the full definition in the Guidance.

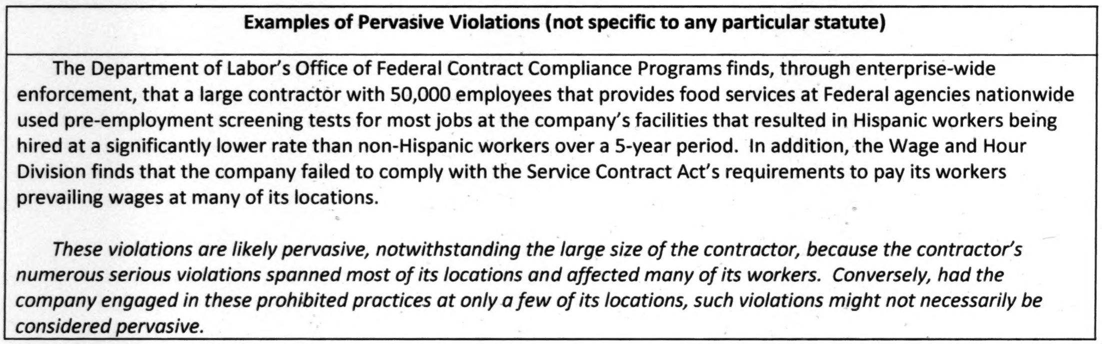
In summary, the Guidance provides that violations of the Labor Laws are "pervasive" if they reflect a basic disregard by the contractor for the Labor Laws as demonstrated by a pattern of serious and/or willful violations, continuing violations, or numerous violations. Violations must be multiple to be pervasive, although having multiple violations does not necessarily mean the violations are pervasive. The number of violations necessarily depends on the size of the contractor, because larger employers, by virtue of their size, are more likely to have multiple violations. To be pervasive, the violations need not be of the same or similar requirements of the Labor Laws. Pervasive violations may exist where the contractor commits multiple violations of the same Labor Law, regardless of their similarity, or violations of more than one of the Labor Laws. This classification is intended to identify those contractors whose numerous violations of Labor Laws indicate that they may view sanctions for their violations as merely part of the "cost of doing business," an attitude that is inconsistent with the level of responsibility required by the FAR.

When assessing Labor Law violations, ALCAs will review the full definition to determine whether a violation is pervasive. The examples below are intended to illustrate how the definition may be applied in different contexts, but a violation can be deemed pervasive as long as it meets the criteria set forth in the Guidance.

ALCAs will classify violations based on information that is readily ascertainable from the Labor Law decisions themselves. They do not second-guess or re-litigate enforcement actions or the decisions of reviewing officials, courts, and arbitrators. While ALCAs and contracting officers may seek additional information from the enforcement agencies to provide context, they generally rely on the information contained in the Labor Law decisions to determine whether violations are serious, repeated, willful, or pervasive under the definitions provided in this Guidance.

Examples of Pervasive Violations (not specific to any particular statute)
A medium-sized company with about 1,000 employees that provides janitorial services at Federal facilities was found to have violated the SCA for failure to pay workers their required wages, Title VII for discrimination in hiring on the basis of national origin, the NLRA for demoting workers who are seeking to organize a union, and the FMLA for denying workers unpaid leave for serious health conditions. *These violations are pervasive because while the violations are substantively different from each other, a medium-sized employer that violates so many Labor Laws is demonstrating a basic disregard for its legal obligations to its workers and is committing pervasive violations.*
A 100-employee IT consulting company was found to have violated EO 11246 for systematically failing to promote women to managerial positions, the FLSA for failing to pay workers overtime after misclassifying them as independent contractors, and the ADEA for constructively discharging employees who were age 60 or over. *These violations are pervasive because while substantively different from each other, a small employer that violates Labor Laws to this degree is demonstrating a basic disregard for its legal obligations to its workers and is committing pervasive violations.*
The Wage and Hour Division issued several Form WH-103 "Employment of Minors Contrary to The Fair Labor Standards Act" notices finding that a clothing manufacturer that provides custom-made uniforms for Federal employees employed numerous underage workers in violation of the child labor provisions of the FLSA. Despite receiving these notices, the contractor failed to make efforts to change its practices and continued to violate the FLSA's child labor provisions repeatedly. *These violations are pervasive because they are a series of repeated violations in which the contractor, despite knowledge of its violations and several repeated notices from WHD, failed to make efforts to change its practices and continued to violate the law repeatedly.*
OSHA cited a small tools manufacturer with about 50 employees in a single location multiple times for a variety of serious violations in the same investigation —once for improper storage of hazardous materials, once for failure to provide employees with protective equipment, once for inadequate safeguards on heavy machinery, once for lack of fall protection, once for insufficient ventilation, once for unsafe noise exposure, and once for inadequate emergency exits. The manufacturer does not have a process for identifying and eliminating serious safety-and-health hazards. *These violations are pervasive because such a high number of serious workplace safety-and-health violations relative to the size of a small company with only a single location and the lack of an effective process to identify and eliminate serious violations (hazards) in its workplace constitute basic disregard by the contractor for worker safety and health. Even though these violations would not be designated as repeated violations by OSHA and would therefore not be repeated violations under the Order, they would be considered pervasive.*

Examples of Pervasive Violations (not specific to any particular statute)
An ALJ at OSHRC found that although the chief safety officer at a chemical plant fielded complaints from workers about several unsafe working conditions, he failed to take action to remedy the unsafe conditions, resulting in numerous willful OSH Act violations. *These violations are pervasive because the dangerous working conditions were willfully sanctioned by a high-level company official and were evident throughout the chemical plant. When Labor Laws are violated with either the explicit or implicit approval of higher-level management, such approval signals that future violations will be tolerated or condoned, and may dissuade workers from reporting violations or raising complaints. Such violations also indicate that the company does not voluntarily eliminate hazards, but instead views penalties for such violations as "the cost of doing business," rather than as indicative of significant threats to its workers' health and safety that must be addressed. Thus, to the extent that higher-level management officials were involved in violations themselves, or knew of violations and failed to have an effective process to identify and correct serious violations in their workplace, the violations are more likely to be deemed pervasive.*
A large company with 5,000 employees that provides uniform services to Federal agencies in several States is cited 10 times for serious OSHA violations over the span of a year. The violations affect most of its inspected locations, and a number of the citations are for high gravity serious failures to abate dangerous conditions that OSHA had cited previously. As a result, the company is placed on OSHA's Severe Violator Enforcement Program. *These violations are pervasive, notwithstanding the large size of the contractor, because the sheer number of high gravity serious violations over such a short period of time is evidence that the company is ignoring persistent threats to workers' safety, fails to treat safety as a serious problem, and is acting in disregard of its legal obligations. In contrast, if the violations affected only a few of the company's facilities, or if the company had acted quickly to abate any violations, the violations might not necessarily be considered pervasive.*
A Federal district court decision in a class-action lawsuit included a finding that the vice president of a construction company directed a foreman not to hire Native American workers, and as a result, the company is found to have committed numerous Title VII violations against job applicants. *These violations are pervasive because a high-level company official actively participated in the discriminatory conduct, resulting in numerous violations. Even though these violations would not be "repeated" because they arose during the same proceeding, they would be considered pervasive. While violations must be multiple to be pervasive, a single liability determination in a class proceeding may be considered "multiple" violations for a determination of pervasiveness.*
While a union was conducting an organizational campaign at a large manufacturer, the contractor held several captive-audience speeches for all of its workers at each of its factories for an extended period of time, threatening the workers with disciplinary measures if they voted to join the union in violation of the National Labor Relations Act (NLRA). In addition, the Wage and Hour Division finds that the company failed to pay overtime to its workers at the vast majority of its locations in violation of the Fair Labor Standards Act. *These violations are pervasive, notwithstanding the large size of the contractor, because the contractor committed multiple serious violations affecting significant numbers of its workers. Conversely, if the contractor made its threatening remarks to only a few of its workers, or if the overtime violations only existed at a few of the contractor's locations, the violations might not necessarily be considered pervasive.*



Examples of Pervasive Violations (not specific to any particular statute)

The Department of Labor's Office of Federal Contract Compliance Programs finds, through enterprise-wide enforcement, that a large contractor with 50,000 employees that provides food services at Federal agencies nationwide used pre-employment screening tests for most jobs at the company's facilities that resulted in Hispanic workers being hired at a significantly lower rate than non-Hispanic workers over a 5-year period. In addition, the Wage and Hour Division finds that the company failed to comply with the Service Contract Act's requirements to pay its workers prevailing wages at many of its locations.

These violations are likely pervasive, notwithstanding the large size of the contractor, because the contractor's numerous serious violations spanned most of its locations and affected many of its workers. Conversely, had the company engaged in these prohibited practices at only a few of its locations, such violations might not necessarily be considered pervasive.

Guidance for Executive Order 13673, "Fair Pay Safe Workplaces"
Appendix E: Assessing Violations of the Labor Laws

When preparing an assessment of a contractor's Labor Law violations, an Agency Labor Compliance Officer (ALCA) follows a three-step process to assess a contractor's record of Labor Law compliance and provide advice to contracting officers. In the first step, classifying the Labor Law violations, an ALCA reviews all of the contractor's violations to determine if any are "serious," "repeated," "willful," and/or "pervasive." Appendices A through D provide summary definitions and examples of Labor Law violations that are "serious," "repeated," "willful," and "pervasive."

In the second step an ALCA weighs the Labor Law violations to determine whether the contractor has a satisfactory record of Labor Law compliance—in other words, whether the contractor's history of Labor Law compliance and any adoption by the contractor of preventative compliance measures indicate that the contracting officer could find the contractor to have a satisfactory record of integrity and business ethics. To do so, the ALCA analyzes any serious, repeated, willful, and/or pervasive violations in light of the totality of the circumstances, including any mitigating factors. The contractor's timely remediation of violations of Labor Laws is generally the most important factor weighing in favor of a conclusion that a contractor has a satisfactory record of Labor Law compliance. The ALCA will also consider factors that weigh against a conclusion that the contractor has a satisfactory record. For example, pervasive violations and violations of particular gravity, among others, may support such an outcome.

In the third step of the assessment process, the ALCA provides written advice and analysis to the contracting officer regarding the contractor's record of Labor Law compliance. The ALCA recommends whether the contractor's record supports a finding of a satisfactory record of integrity and business ethics. In cases where the ALCA concludes that a contractor has an unsatisfactory record of Labor Law compliance, the ALCA will recommend the negotiation of a labor compliance agreement or other appropriate action such as notification of the agency suspending and debarring official. If the ALCA concludes that a labor compliance agreement is warranted, the ALCA will recommend whether the agreement should be negotiated before or after the award. The written analysis supporting the advice describes the ALCA's classification and weighing of the contractor's Labor Law violations and includes the rationale for the recommendation.

Mitigating Factors that Weigh in Favor of a Satisfactory Record of Labor Law Compliance

Various factors may mitigate the existence of a contractor's Labor Law violations. The Department respects the fact that most employers endeavor to comply with the Labor Laws. The Department values highly contractors' good-faith efforts to comply, and it encourages them to report these efforts, including workplace policies that foster compliance. The following are the most common factors that will mitigate the existence of one or more violations in the context of a responsibility determination. This is not an exhaustive list. None of these mitigating factors, standing alone, is necessarily determinative. Contractors are encouraged to report any information they believe demonstrates a satisfactory record of Labor Law compliance.

- **Remediation of the violation(s), including Labor Compliance Agreements:** Typically the most important factor that can mitigate the existence of a violation, remediation is an indication that a contractor has assumed responsibility for a violation and has taken steps to bring itself into compliance with the law going forward. In most cases, for remediation to be considered mitigating, it should

Mitigating Factors that Weigh in Favor of a Satisfactory Record of Labor Law Compliance
involve two components: ○ **Correction of the violation:** The remediation should correct the violation itself, including by making any affected workers whole. For example, this could involve abating a dangerous hazard, paying workers their back wages owed, or reinstating a wrongfully discharged employee. ○ **Efforts to prevent similar violations in the future:** Particular consideration will be given where the contractor has implemented remediation on an enterprise-wide level or has entered into an enhanced settlement agreement with the relevant enforcement agency or agencies that goes beyond what is minimally required under the law to address appropriate remedial or compliance measures. One specific type of remediation is a Labor Compliance Agreement, which is an agreement entered into between an enforcement agency and a contractor to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with labor laws, or other related matters. A Labor Compliance Agreement is an important mitigating factor because it indicates that the contractor recognizes the importance that the Federal Government places on compliance with the Labor Laws. • **Only one violation:** While a contracting officer is not precluded from making a determination of nonresponsibility based on a single violation in the circumstances where merited, in most cases a single violation of a Labor Law will not give rise to a lack of responsibility, depending on the nature of the violation. • **Low number of violations relative to size:** Larger employers, by virtue of their size, are more likely to have multiple violations than smaller ones. When assessing contractors with multiple violations, a contracting officer and Labor Compliance Advisor should consider the size of the contractor. • **Safety and health programs, grievance procedures, or other compliance programs:** Contractors can help to assure future compliance by implementing a safety-and-health management program such as OSHA's 1989 Safety and Health Program Management guidelines or any updates to those guidelines, grievance procedures (including collectively-bargained ones), monitoring arrangements negotiated as part of either a settlement agreement or labor compliance agreement, or other similar compliance programs. Such programs and procedures can foster a corporate culture in which workers are encouraged to raise legitimate concerns about Labor Law violations without the fear of repercussions; as a result, they may also prompt workers to report violations that would, under other circumstances, go unreported. Therefore, implementation or prior existence of such a program is a mitigating factor. • **Recent legal or regulatory change:** To the extent that the Labor Law violations can be traced to a recent legal or regulatory change, that may be a mitigating factor. This may be case where a new interpretation of an existing statute is applied retroactively and a contractor's pre-change conduct is found to be a violation. For example, where prior agency or court decisions suggested that a practice was lawful, but the Labor Law decision finds otherwise, this may be a mitigating factor. • **Good faith and reasonable grounds:** It may be a mitigating factor where the findings in the relevant Labor Law decision support the contractor's defense that it had reasonable grounds for believing that it was not violating the law. For example, if a contractor acts in reliance on advice from a responsible official from the relevant enforcement agency, or an administrative or authoritative judicial ruling, such reliance will typically demonstrate good faith and reasonable grounds. This mitigating factor also applies where a violation otherwise resulted from the conduct of a government official. For example, a DBA violation may be mitigated where the contracting agency failed to include the relevant contract

Mitigating Factors that Weigh in Favor of a Satisfactory Record of Labor Law Compliance

clause and wage determination in a contract.

- **Significant period of compliance following violations:** If, following one or more violations within the three-year reporting period, the contractor maintains a steady period of compliance with the Labor Laws, such compliance may mitigate the existence of prior violations (e.g., violations were reported from 2½ years ago and there have been none since). This is a stronger mitigating factor where the contractor has a recent Labor Law decision that it must disclose, but the underlying conduct took place significantly prior to the 3-year disclosure period and the contractor has had no subsequent violations.

Factors that Weigh Against a Satisfactory Record of Labor Law Compliance

The following types of violations present factors that weigh against a conclusion that a contractor has a satisfactory record of Labor Law compliance. The list of factors below is not exhaustive. Nor are any of these factors necessarily determinative. An ALCA reviews these factors as part of an evaluation of the totality of the circumstances. In some cases, several factors may need to be present in order for an ALCA to conclude that a contractor has an unsatisfactory record of Labor Law compliance. Depending on the facts of the case, even where multiple factors are present, they may be outweighed by mitigating circumstances.

- **Pervasive violations.** Pervasive violations, by definition, demonstrate a basic disregard for the Labor Laws. Such disregard of legal obligations creates a heightened danger that the contractor may, in turn, disregard its contractual obligations as well. Additionally, such contractors are more likely to violate the Labor Laws in the future, and those violations – and any enforcement proceedings or litigation that may ensue – may imperil their ability to meet their obligations under a contract. The fact that a contractor shows such disregard for the Labor Laws weighs strongly against a satisfactory record of Labor Law Compliance.
- **Violations that are serious AND repeated, serious AND willful, or willful AND repeated.** A violation that falls into two or more these categories, as a general matter, is more likely to be probative of the contractor's disregard for legal obligations and working conditions than a violation that falls into only one of those categories.
- **Violations of particular gravity.** Two violations in the same classification will not necessarily receive equal weight. Labor Law violations that are of particular gravity and should be given greater weight include (but are not limited to):
    - Violations related to the death of an employee;
    - Violations involving a termination of employment for exercising a right protected under the Labor Laws;
    - Violations that detrimentally impact the working conditions of all or nearly all of the workforce at a worksite; and
    - Violations where the amount of back wages, penalties, and other damages awarded is greater than $100,000.
- **Violations for which a court has granted injunctive relief.** Where a court has granted injunctive relief to remedy a violation that is classified as serious, repeated, willful, or pervasive, the violation should be given greater weight.
- **Violations that are reflected in final orders.** To the extent that the judgment, determination, or order finding a Labor Law violation is final (because appeals and opportunities for further review have been exhausted or were not pursued), the violation should be given greater weight. Likewise, where a violation has not resulted in a final judgment, determination, or order, it should be given lesser weight.

Factors that Weigh Against a Satisfactory Record of Labor Law Compliance

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Part IV

Securities and Exchange Commission

Self-Regulatory Organizations: Notice of Filing of a Proposed Rule Change by Miami International Securities Exchange, LLC To Adopt New Rules To Govern the Trading of Complex Orders on the Exchange; Notices

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78620; File No. SR–MIAX–2016–26]

Self-Regulatory Organizations: Notice of Filing of a Proposed Rule Change by Miami International Securities Exchange, LLC To Adopt New Rules To Govern the Trading of Complex Orders on the Exchange

August 18, 2016.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 8, 2016, Miami International Securities Exchange LLC (“MIAX” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt new rules to govern the trading of complex orders on the Exchange.

The text of the proposed rule change is available on the Exchange’s Web site at *http://www.miaxoptions.com/filter/wotitle/rule_filing*, at MIAX’s principal office, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to adopt new rules that describe the trading of complex orders on the Exchange. Proposed new Rule 518, Complex Orders, details the functionality of the MIAX System [3] in the handling of complex orders on the Exchange. The proposed rules are based substantially on similar rules of other exchanges.[4] The Exchange believes that the similarity of its proposed complex order rules to those of other exchanges will allow the Exchange’s proposed complex order functionality to fit seamlessly into the greater options marketplace and benefit market participants who are already familiar with similar functionality offered on other exchanges.

Additionally, the Exchange is proposing to amend Exchange Rule 516, Order Types Defined, to add a cross-reference to Rule 518 stating that complex order types are defined in Rule 518 and that, specifically, derived orders (as discussed below) are defined in Rule 518(a)(9). The Exchange is also proposing to amend Exchange Rules 519A, Risk Protection Monitor, to include complex orders in the rule; 521, Nullification and Adjustment of Options Transactions Including Obvious Errors, to establish the process for handling complex order obvious errors, and 605, Market Maker Orders, to add certain complex orders to the enumerated orders in which Exchange Market Makers may place orders on the Exchange, as described below.

Definitions

Proposed Rule 518(a) provides definitions of terms that apply to the trading of complex orders, and such terms are used throughout this proposed rule change.

The term “ABBO” means the best bid(s) or offer(s) disseminated by other Eligible Exchanges (defined in Rule 1400(f)) [5] and calculated by the Exchange based on market information received by the Exchange from OPRA.

The Complex National Best Bid or Offer (“cNBBO”) is calculated using the NBBO for each component of a complex strategy to establish the best net bid and offer for a complex strategy. For stock-option orders (described below), the cNBBO for a complex strategy will be calculated using the NBBO in the individual option component(s) and the NBBO in the stock component.

A “Complex Auction” is an auction of a complex order as set forth in proposed Rule 518(d), described below.

A “Complex Auction-eligible order” is an order that meets the requirements of proposed Rule 518(d)(1), as described below.

A “complex order” is any order involving the concurrent purchase and/or sale of two or more different options in the same underlying security (the “legs” or “components” of the complex order),[6] for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for the purposes of executing a particular investment strategy. Mini-options may only be part of a complex order that includes other mini-options.[7] Only those complex orders in the classes designated by the Exchange and communicated to Members via Regulatory Circular with no more than the applicable number of legs, as determined by the Exchange on a class-by-class basis and communicated to Members via Regulatory Circular, are eligible for processing.

A complex order can also be a “stock-option order” as described further, and subject to the limitations set forth, in proposed Interpretations and Policies .01 of proposed Rule 518. A stock-option order is an order to buy or sell a stated number of units of an underlying security (stock or Exchange Traded Fund Share (“ETF”)) or a security convertible into the underlying stock (“convertible security”) coupled with the purchase or sale of options contract(s) on the opposite side of the market representing either (i) the same number of units of the underlying security or convertible security, or (ii) the number of units of the underlying stock necessary to create a delta neutral position, but in no case in a ratio greater than eight-to-one (8.00), where the ratio represents the total number of units of the underlying security or convertible security in the option leg to the total number of units of the underlying security or convertible security in the stock leg. Only those stock-option orders in the classes designated by the Exchange and communicated to Members via Regulatory Circular with no more than the applicable number of legs as determined by the Exchange on a class-by-class basis and communicated to Members via Regulatory Circular, are eligible for processing.[8]

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The term “System” means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[4] *See, e.g.,* Chicago Board Options Exchange, Inc. (“CBOE”) Rule 6.53(C)[sic]; International Securities Exchange LLC (“ISE”) Rule 722; NYSE MKT Rule 980NY; BOX Options Exchange LLC (“BOX”) Rule 7240; NASDAQ OMX PHLX LLC (“PHLX”) Rule 1098; NYSEArca Rule 6.91.

[5] “Eligible Exchange” means a national securities exchange registered with the SEC in accordance with Section 6(a) of the Act that: (1) Is a Participant Exchange in OCC (as that term is defined in Section VII of the OCC by-laws); (2) is a party to the OPRA Plan (as that term is described in Section I of the OPRA Plan); and (3) if the national securities exchange is not a party to the Options Order Protection and Locked/Crossed Markets Plan, is a participant in another plan approved by the Commission providing for comparable Trade-Through and Locked and Crossed Market protection. *See* Exchange Rule 1400(f).

[6] The different options in the same underlying security that comprise a particular complex order are referred to as the “legs” or “components” of the complex order throughout this proposal.

[7] This definition is consistent with other options exchanges. *See e.g.,* CBOE Rule 6.53C(a)(1). *See also* PHLX Rule 1098(a)(i); NYSE MKT Rule 900.3NY(e); and BOX Rule 7240(a)(5).

The term "complex strategy" means a particular combination of components and their ratios to one another. New complex strategies can be created as the result of the receipt of a complex order, or by the Exchange for a complex strategy that is not currently in the System. The Exchange may limit the number of new complex strategies that may be in the System at a particular time and will communicate this limitation to Members via Regulatory Circular.

A "complex quote" is a Market Maker complex Standard quote or complex eQuote for a complex strategy as set forth in Interpretations and Policies .02 of proposed Rule 518, described below.

The Displayed Complex MIAX Best Bid or Offer ("dcMBBO") is calculated using the best displayed price for each component of a complex strategy from the Simple Order Book. For stock-option orders, the dcMBBO for a complex strategy will be calculated using the Exchange's best displayed bid or offer in the individual option component(s) and the NBBO in the stock component.

A "derived order" is an Exchange-generated limit order on the Simple Order Book that represents either the bid or offer of one component of a complex order resting on the Strategy Book that is comprised of orders to buy or sell an equal quantity (with a one-to-one ratio) of two option components.[9] This order type is also used on other exchanges in the trading of complex orders. Derived orders will not be routed outside of the Exchange regardless of the price(s) disseminated by away markets. The Exchange will determine on a class-by-class basis to make available derived orders and communicate such determination to Members via a Regulatory Circular. The purpose of this provision is to carefully manage the number of derived orders being generated so that they do not negatively impact system capacity and performance. Derived orders are firm orders (*i.e.*, if executed, firm for the disseminated price and size) that are included in the MBBO (as defined below).[10]

A derived order may be automatically generated for one or more legs of a complex order at a price that matches or improves upon the best displayed bid or offer in the affected series on the Simple Order Book and at a price at which the net price of the complex order on the Strategy Book can be achieved when the other component(s) of the complex order is (are) executed against the best displayed bid or offer on the Simple Order Book. A derived order will not be displayed at a price that locks or crosses the best bid or offer of another exchange (the "ABBO").[11] In such a circumstance, the System will display the derived order on the Simple Order Book at a price that is one Minimum Price Variation ("MPV")[12] away from the current opposite side best bid or offer of such other exchange, and rank the derived order on the Simple Order Book according to its actual price. A derived order will not be created at a price increment less than the minimum established by Rule 510.

Example—*Derived order adjusted so as not to lock (cross) the ABBO*

MIAX—Mar 50 Put 1.00 (10)—1.20 (20)
MIAX—Mar 55 Call 1.00 (10)—1.20 (20)
ABBO—Mar 50 Put 1.00 (10)—1.05 (10)
ABBO—Mar 55 Call 1.00 (10)—1.20 (10)

The Exchange receives a Priority Customer buy order to purchase 1 Mar 50 put and purchase 1 Mar 55 call for a 2.25 debit, 10 times. The order is not designated as Complex Auction-on-Arrival (cAOA) and will not initiate an auction upon arrival even if it equals or improves the Upon Receipt Improvement Percentage ("URIP," as defined in proposed Rule 518, Interpretations and Policies .04[sic](b)).

The icMBBO[13] is 2.00 debit bid, 10 times at 2.40 credit offer, 20 times
The dcMBBO is 2.00 debit bid, 10 times at 2.40 credit offer, 20 times
The URIP Percentage is 60% of the bid ask spread or 0.24

There is no offsetting complex order to sell and the complex order cannot leg into the Simple Order Market because the icMBBO offer for the complex order on the MIAX Simple Order Book is offered at 2.40.

A derived order to buy the Mar 50 put for 1.05 (calculated by determining the component price that achieves the net price (2.25 debit) that can execute against the best displayed price on the Simple Order Book), 10 times would lock the ABO if displayed at $1.05 and therefore be in violation, so the derived order will instead be created at 1.05 and displayed at 1.00, one MPV inside of the ABO, in this case joining the MIAX's best bid for the Mar 50 put of 1.00; while managed at a non-displayed price on the Simple Order Book to buy at 1.05:

Mar 50 Put 1.00 (20) (10 derived order displayed at 1.00 and booked at 1.05)—1.20 (20)
Mar 55 Call 1.00 (10)—1.20 (20)

The new icMBBO is 2.05 debit bid, 10 times at 2.40 credit offer, 20 times

If a marketable order to sell Mar 50 put 1 or more times is received, it will execute against the derived order to buy the Mar 50 put at the non-displayed price for 1.05 1 or more times and the

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[8] This is substantially similar to the definition of a stock-option order on other exchanges. *See, e.g.*, CBOE Rule 6.53C(a)(2) and PHLX Rule 1098.

[9] The Exchange notes that a derived order is the equivalent of a similar order type on other exchanges. *See, e.g.*, PHLX Rule 1098(f)(iii)(C) (Legging Orders). Like a MIAX derived order, a Legging Order on PHLX may be generated for one leg of a Complex Order at a price: (i) That matches or improves upon the best PHLX displayed bid or offer; and (ii) at which the net price can be achieved when the other leg is executed against the best displayed bid or offer on PHLX. The PHLX rule governs situations in which a Legging Order will not be created; the proposed MIAX rule states that a derived order will not be displayed at a price that locks or crosses the best bid or offer of another exchange, and that a derived order will not be created at a price increment less than the minimum established by MIAX Rule 510, whereas the PHLX rule states that Legging Orders may be generated and executed in an increment other than the minimum increment for that series and will be ranked on the order book at its generated price and displayed at a price that is rounded to the nearest minimum increment for that series. The rules also differ slightly in the manner and circumstances in which derived or Legging Orders may be removed from the Simple Order Book. *See infra* note 19.

[10] The derived order type is also firm on other exchanges. *See, e.g.*, ISE Rule 715(k), which states that "Legging" orders are firm orders that are included in the ISE's displayed best bid or offer. *See also, e.g.*, BOX Rule 7240(c), which states that a "Legging Order" is a firm order that is included in the BBO if it is equal to, or better than, the existing BBO.

[11] This is similar to the rules of another exchange. BOX rules state that a "Legging Order" that would lock or cross opposite side NBBO will be ranked on the BOX Book at the locking price and displayed at one minimum trading increment below the current NBO (for bids) or one minimum trading increment above the current NBB (for offers) for the applicable series ("display-price sliding"). *See* BOX Rule 7240(c)(2)(i).

[12] For a complete description of MPVs, *see* Exchange Rule 510.

[13] The Implied Complex MIAX Best Bid or Offer ("icMBBO") is a calculation that uses thebest [sic] price from the Simple Order Book for each component of a complex strategy including displayed and non-displayed trading interest. For stock-option orders, the icMBBO for a complex strategy will be calculated using the best price (whether displayed or non-displayed) on the Simple Order Book in the individual option component(s), and the NBBO in the stock component. *See* proposed Rule 518(a)(11), described below.

System will automatically execute the other leg of the complex order against the Simple Order Book offer for the Mar 55 call at 1.20 for the same quantity. As a result, the net price of 2.25 is achieved for the complex order (buy the Mar 50 put for 1.05 and buy Mar 55 call for 1.20 = 2.25 net price).

A derived order will be handled in the same manner as other orders on the Simple Order Book except as otherwise provided in proposed Rule 518, and will be executed only after all other executable orders (including orders subject to the managed interest process as described below) and quotes at the same price are executed in full. When a derived order is executed, the other component of the complex order on the Strategy Book will be automatically executed against the best bid or offer on the Exchange.[14] The Exchange believes that a derived order, created for the execution of a complex order, should not be afforded priority over resting orders and quotes on the Simple Order Book, and therefore has determined to protect the priority on the Simple Order Book of such resting orders and quotes.

Example—*Derived order is last in priority on the Simple Order Book*

MIAX—Mar 50 Call 2.00 (10)—2.10 (60)
MIAX—Mar 55 Call 1.00 (20)—1.10 (80)

The Exchange receives a Priority Customer complex order to buy 1 Mar 50 call and sell 1 Mar 55 call for a 1.00 debit, 5 times. The order is not designated as cAOA and will not initiate a Complex Auction upon arrival even if it equals or improves the URIP. There is no Customer interest resting on the Strategy Book.

The icMBBO is 0.90 debit bid, 10 times at 1.10 credit offer, 20 times
The dcMBBO is 0.90 debit bid, 10 times at 1.10 credit offer, 20 times
The URIP Percentage is 60% of the bid ask spread or 0.12

There is no offsetting complex order to sell and the complex order cannot leg into the Simple Order Market because the icMBBO offer for the complex order on the MIAX Simple Order Book is offered at 1.10. A derived order to buy the Mar 50 call for 2.00, 5 times may be automatically generated by the System without violating protected quotations at away markets for either leg. The derived buy order will join the MBB for the March 50 call and will not change the MIAX's icMBBO price.

Mar 50 Call 2.00 (15 total, 5 from derived order)—2.10 (60)

The new icMBBO is 0.90 debit bid, 15 times at 1.10 credit offer, 20 times

If a marketable order to sell Mar 50 call 15 times or more is received, it will execute first against the order on the Simple Order Book and then against the derived order to buy the Mar 50 call for 2.00 5 times and the System will automatically execute the other leg of the complex order against the Simple Order Book bid for the Mar 55 call at 1.00 5 times. As a result, the net price of 1.00 is achieved for the complex order (buy the Mar 50 call for 2.00 and sell the Mar 55 call at 1.00 = 1.00 net price).

A derived order is automatically removed from the Simple Order Book if (i) the displayed price of the derived order is no longer at the displayed best bid or offer on the Simple Order Book, (ii) execution of the derived order would no longer achieve the net price of the complex order on the Strategy Book when the other component of the complex order is executed against the best bid or offer on the Simple Order Book, (iii) the complex order is executed in full, (iv) the complex order is cancelled, or (v) any component of the complex order resting on the Strategy Book that is used to generate the derived order is subject to a Simple Market Auction or Timer ("SMAT") Event,[15] a wide market condition,[16] or a halt[17] (each as described below).[18] This is similar to the functionality regarding derived order equivalents on other exchanges.[19]

Example—*Derived order is cancelled when a component of a complex order is subject to a SMAT Event*[20]

MIAX—Mar 50 Put 1.00 (10)—1.20 (20)
MIAX—Mar 55 Call 1.00 (10)—1.20 (20)
ABBO—Mar 50 Put 1.05 (10)—1.20 (10)
ABBO—Mar 55 Call 1.00 (10)—1.20 (10)

The Exchange receives a Priority Customer complex order to buy 1 Mar 50 put and purchase 1 Mar 55 call for a 2.25 debit, 10 times. The order is not designated as cAOA and will not initiate an auction upon arrival even if it equals or improves the URIP.

The icMBBO is 2.00 debit bid, 10 times at 2.40 credit offer, 20 times
The dcMBBO is 2.00 debit bid, 10 times at 2.40 credit offer, 20 times
The URIP Percentage is 60% of the bid ask spread or 0.24

There is no offsetting complex order to sell and the complex order cannot leg into the Simple Order Market because the icMBBO offer for the complex order on the MIAX Simple Order Book is offered at 2.40.

Derived orders to buy the Mar 50 put for 1.05, 10 times and the Mar 55 call for 1.05, 10 times may be automatically generated by the System without violating protected quotations at away markets for either leg, improving the MIAX's best bid for each of the Mar 50 put and the Mar 55 call to 1.05:

Mar 50 Put 1.05 (10) (Derived order)—1.20 (20)
Mar 55 Call 1.05 (10) (Derived order)—1.20 (20)

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[14] *See* Note 11.

[15] A SMAT Event is defined as any of the following: A PRIME Auction (pursuant to Exchange Rule 515A); a Route Timer (pursuant to Exchange Rule 529); or a liquidity refresh pause (pursuant to Exchange Rule 515(c)(2)). *See* proposed Rule 518(a)(16).

[16] A "wide-market condition" is defined as any individual component of a complex strategy having, at the time of evaluation, an MBBO quote width that is wider than the permissible valid quote width as defined in Rule 603(b)(4). *See* proposed Rule 518, Interpretations and Policies .05(e).

[17] *See* Exchange Rule 504.

[18] *See* proposed Rule 518(a)(9).

[19] Respecting the removal of derived orders from the Simple Order Book, PHLX Rule 1098(f)(iii)(C) lists additional scenarios under which a PHLX "legging" Order on PHLX is automatically removed from the regular order book: (i) If the price of the legging Order is no longer at the Exchange's displayed best bid or offer on the regular limit order book, (ii) if execution of the legging Order would no longer achieve the net price of the Complex Order when the other leg is executed against the Exchange's best displayed bid or offer on the regular limit order book (other than another legging Order), (iii) if the Complex Order is executed in full or in part (this differs from proposed Rule 518(a)(9)(vi)(C), which states that a derived order will be removed if executed in full), (iv) if the Complex Order is cancelled or modified (proposed Rule 518(a)(9)(vi)(D) states that the derived order will be removed if cancelled but not if modified). Similarly, a legging order on ISE is automatically removed from the regular limit order book if: (i) The price of the legging order is no longer at the displayed best bid or offer on the regular limit order book, (ii) execution of the legging order would no longer achieve the net price of the complex order when the other leg is executed against the best displayed bid or offer on the regular limit order book, (iii) the complex order is executed in full or in part (again unlike proposed Rule 518(a)(9)(vi)(C) which only include a derived order executed in full) against another complex order on the complex order book, or (iv) the complex order is cancelled or modified (unlike Rule 518((a)(9)(vi)(C)[sic] which does not include a provision for modification). *See also,* ISE Rule 715(k), which states that a legging order is automatically removed from the regular limit order book if: (i) The price of the legging order is no longer at the displayed best bid or offer on the regular limit order book, (ii) execution of the legging order would no longer achieve the net price of the complex order when the other leg is executed against the best displayed bid or offer on the regular limit order book, (iii) the complex order is executed in full or in part against another complex order on the complex order book, or (iv) the complex order is cancelled or modified. *See also,* BOX Rule 7240(c) respecting BOX "legging" Orders.

[20] This example describes a PRIME Auction in any one of the components used to generate the derived order. The example could apply to such a component that is subject to any SMAT Event.

If in the Simple Order Book, a PRIME Auction (or other SMAT Event) were to start in either the Mar 50 put or the Mar 55 call, the System will automatically cancel the derived order to buy the Mar 50 put while simultaneously cancelling the derived order to buy the Mar 55 call.

Example—*Derived order is created resulting in the execution of a complex order and simultaneous cancellation of the other unneeded derived order.*

MIAX—Mar 50 Put 1.00 (10)—1.20 (20)
MIAX—Mar 55 Call 1.00 (10)—1.20 (20)
ABBO—Mar 50 Put 1.05 (10)—1.20 (10)
ABBO—Mar 55 Call 1.00 (10)—1.20 (10)

The Exchange receives a Priority Customer complex order to buy 1 Mar 50 put and buy 1 Mar 55 call for a 2.25 debit, 10 times. The order is not designated as cAOA and will not initiate an auction upon arrival even if it equals or improves the URIP.

The icMBBO is 2.00 debit bid, 10 times at 2.40 credit offer, 20 times
The dcMBBO is 2.00 debit bid, 10 times at 2.40 credit offer, 20 times
The URIP Percentage is 60% of the bid ask spread or 0.24

There is no offsetting complex order to sell and the complex order cannot leg into the Simple Order Market because the icMBBO offer for the complex order on the MIAX Simple Order Book is offered at 2.40.

Derived orders to buy the Mar 50 put for 1.05, 10 times and the Mar 55 call for 1.05, 10 times may be automatically generated by the System without violating protected quotations at away markets for either leg, improving the MIAX's best bid for each of the Mar 50 put and the Mar 55 call to 1.05:

Mar 50 Put 1.05 (10) (derived order)—1.20 (20)
Mar 55 Call 1.05 (10) (derived order)—1.20 (20)

The new icMBBO is 2.10 debit bid, 10 times at 2.40 credit offer, 20 times. If a marketable order to sell Mar 50 put 10 times or more is received, it will execute against the derived order to buy the Mar 50 put for 1.05 10 times and the System will automatically execute the other leg of the complex order against the Simple Order Book offer for the Mar 55 call at 1.20 while simultaneously cancelling the now unneeded derived order to buy the Mar 55 call for 1.05. As a result, the net price of 2.25 is achieved for the complex order (buy the Mar 50 put for 1.05 and buy Mar 55 call for 1.20 = 2.25 net price).

Finally, proposed Rule 518(a)(9)(vii) provides that a derived order that is locked (*i.e.,* if the opposite side MBBO locks the derived order) will be executed if the execution price is at the NBBO.

The Exchange believes that derived orders will significantly enhance the Strategy Book by enabling greater interaction of multi-legged orders with the Simple Order Book. This functionality should tighten spreads on the MIAX Simple Order Book, resulting in better executions for complex orders and for regular orders.

The term "free trading" means trading that occurs during a trading session other than: (i) At the opening or re-opening for trading following a halt, or (ii) during the Complex Auction Process (as described below and in proposed Rule 518(d)).

The Implied Complex Best Bid or Offer ("icMBBO") is a calculation that uses the best price from the Simple Order Book for each component of a complex strategy including displayed and non-displayed trading interest. For stock-option orders, the icMBBO for a complex strategy will be calculated using the best price (whether displayed or non-displayed) on the Simple Order Book in the individual option component(s), and the national best bid or offer ("NBBO") in the stock component.

Certain Market Maker complex Standard quotes and complex eQuotes (as defined below) will qualify as "Market Maker Priority Interest for Complex" on the Strategy Book (as defined below) if the criteria described herein have been met.[21] For purposes of the proposed Rule, Market Maker Priority Interest for Complex is established at the beginning of a Complex Auction (as described in proposed Rule 518(d) below), or at the time of execution in free trading.

If complex Standard quoting is engaged for a complex strategy,[22] a Market Maker complex Standard quote or complex eQuote will qualify as Market Maker Priority Interest for Complex if the Market Maker has a complex Standard quote in the complex strategy that equals or improves the dcMBBO on the opposite side from the incoming complex order or quote at the time of evaluation (a "Complex priority quote").[23] The Exchange's proposal to adopt Market Maker Priority Interest for Complex in the Strategy Book is substantially based upon principles and rules currently operative on the Exchange respecting the Simple Order Book.[24] While the priority and trade allocation method for the Strategy Book, described below, distinguishes among Market Maker Priority Interest and Market Maker non-Priority Interest,[25] the proposed rules concerning complex priority are not novel, and have simply emerged from the priority rules already in existence on the Exchange.

The term "MBBO" means the best bid or offer on the Simple Order Book (as defined below) on the Exchange, and the term "NBBO" means the national best bid or offer as calculated by the Exchange based on market information received by the Exchange from the appropriate Securities Information Processor ("SIP").[26]

The "Simple Order Book" is the Exchange's regular electronic book of orders and quotes.

A Simple Market Auction or Timer ("SMAT") Event is defined as a PRIME

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[21] Market Maker complex quotes may be entered as either complex Standard quotes or complex eQuotes. A complex eQuote is either a Complex Auction or Cancel eQuote ("cAOC eQuote") or an "Immediate or Cancel eQuote" ("cIOC eQuote") A cAOC eQuote is an eQuote submitted by a Market Maker that is used to provide liquidity during a specific Complex Auction with a time in force that corresponds with the duration of the Complex Auction. A cIOC eQuote is a complex eQuote with a time-in-force of IOC that may be matched with another complex quote or complex order for an execution to occur in whole or in part upon receipt into the System. cIOC eQuotes will not: (i) Be executed against individual orders and quotes resting on the Simple Order Book; (ii) be eligible to initiate a Complex Auction or join a Complex Auction in progress; or (iii) rest on the Strategy Book. Any portion of a cIOC eQuote that is not executed will be immediately cancelled. *See* proposed Rule 518, Interpretations and Policies .02.

[22] Complex Standard quoting will be engaged by the Exchange for complex strategies on a strategy-by-strategy basis. The strategies for which complex Standard quoting is engaged will be communicated to Members via Regulatory Circular. *See* proposed Rule 518, Interpretations and Policies .02. Among the criteria used in determining the classes for which complex Standard quoting will be engaged are average daily volume in the class, number of expiration months and strike prices in the class, number of strike prices at or near the money in the class, and input from Members. This differs slightly from ISE, which states merely that market makers may enter quotes for complex order strategies on the complex order book in their appointed options classes. *See* ISE Rule 722, Supplementary Material .03.

[23] The Exchange notes that, unlike the continuous quoting requirements in the simple order market, there are no continuous quoting requirements respecting complex orders. This is similar to ISE, where market makers are not required to enter quotes on the complex order book. Quotes for complex orders are not subject to any quotation requirements that are applicable to market maker quotes in the regular market for individual options series or classes. *See* ISE Rule 722, Supplementary Material .03.

[24] The Exchange currently follows the established hierarchy that generally affords priority to Priority Customer Orders, then to Market Makers with priority quotes, followed by Professional Interest at the same price. *See* Exchange Rule 514.

[25] *See* proposed Rule 518(c)(3)(ii).

[26] All U.S. exchanges and associations that quote and trade exchange-listed securities must provide their data to a centralized SIP for data consolidation and dissemination. *See* 15 U.S.C. 78c (22)(A).

Auction (pursuant to Rule 515A);[27] a Route Timer (pursuant to Rule 529);[28] or a liquidity refresh pause (pursuant to Rule 515(c)(2)).[29] Complex orders and quotes will be handled during a SMAT Event as described in proposed Interpretations and Policies .05(e)(2) of proposed Rule 518, as discussed below.

The "Strategy Book" is the Exchange's electronic book of complex orders and complex quotes.[30]

Types of Complex Orders

Proposed Rule 518(b), Types of Complex Orders, describes the various types and specific times-in-force for complex orders handled by the System.

As an initial matter, proposed Rule 518(b)(1) states that the Exchange will issue a Regulatory Circular listing which complex order types, among the complex order types set forth in the proposed Rule, are available for use on the Exchange. Additional Regulatory Circulars will be issued as additional complex order types, among those complex order types set forth in the proposed Rule, become available for use on the Exchange. Regulatory Circulars will also be issued when a complex order type that had been in usage on the Exchange will no longer be available for use. This is substantially similar to, and based upon, the manner in which the Exchange determines the available order types in the Simple Order Book.[31] The purpose of this provision is to enable the Exchange to modify the complex order types that are available on the Exchange as market conditions change. The Exchange believes that this enhances its ability to remain competitive as markets and market conditions change and evolve.

Among the complex order types that may be submitted are limit orders, market orders, Good 'til Cancelled ("GTC") orders, or day limit orders as each such term is defined in Rule 516,[32] or Complex Auction-on-Arrival ("cAOA") orders, Complex Auction-or-Cancel ("cAOC") orders, or Complex Immediate-or-Cancel ("cIOC") orders, as such terms are defined below.

Complex orders will be considered ineligible to initiate a Complex Auction upon receipt unless designated as Complex Auction-on-Arrival ("cAOA") orders.[33] Proposed Rule 518(b)(2)(i) defines a cAOA order as a complex order designated to be placed into a Complex Auction upon receipt or upon evaluation. Complex orders that are not designated as cAOA will, by default, not initiate a Complex Auction upon arrival, but except as described herein will be eligible to participate in a Complex Auction that is in progress when such complex order arrives or if placed on the Strategy Book may participate in or may initiate a Complex Auction, following evaluation conducted by the System (as described below). Complex orders that are designated as cIOC or cAOC are not eligible for cAOA designation, and their evaluation will not result in the initiation of a Complex Auction either upon arrival or if eligible when resting on the Strategy Book.

A complex order may also be submitted as a cAOC order. A cAOC order is a complex limit order used to provide liquidity during a specific Complex Auction with a time in force that corresponds with that event. cAOC orders are not displayed to any market participant, and are not eligible for trading outside of the event.

Additionally, a complex order may be submitted as a Complex Immediate-or-Cancel or "cIOC" order, which is a complex order that is to be executed in whole or in part upon receipt. Any portion not so executed is cancelled.

Trading of Complex Orders and Quotes

Proposed Rule 518(c), Trading of Complex Orders and Quotes, describes the manner in which complex orders will be handled and traded on the Exchange. The Exchange will determine and communicate to Members via Regulatory Circular which complex order origin types (*i.e.*, non-broker-dealer customers, broker-dealers that are not Market Makers on an options exchange, and/or Market Makers on an options exchange) are eligible for entry onto the Strategy Book.[34] The rule also states that complex orders will be subject to all other Exchange Rules that pertain to orders generally, unless otherwise provided in proposed Rule 518.

Proposed Rule 518(c)(1) provides that bids and offers on complex orders and quotes may be expressed in $0.01 increments, and the component(s) of a complex order may be executed in $0.01 increments, regardless of the minimum increments otherwise applicable to individual components of the complex order,[35] and that if any component of a complex strategy would be executed at a price that is equal to a Priority Customer bid or offer on the Simple Order Book, at least one other component of the complex strategy must trade at a price that is better than the corresponding MBBO.[36]

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[27] The MIAX Price Improvement Mechanism ("PRIME") is a process by which a Member may electronically submit for execution ("Auction") an order it represents as agent ("Agency Order") against principal interest, and/or an Agency Order against solicited interest. *See* Exchange Rule 515A.

[28] The Exchange may automatically route orders to other exchanges under certain circumstances ("Routing Services"). In connection with such services, one of two Route Mechanisms, Immediate Routing or the Route Timer, will be used when a Public Customer order is received and/or reevaluated that is both routable and marketable against the opposite side ABBO upon receipt and the Exchange's disseminated market is not equal to the opposite side ABBO, or is equal to the opposite side ABBO and of insufficient size to satisfy the order. For those initiating Public Customer orders that are routable, but do not meet the additional criteria for Immediate Routing, the System will implement a Route Timer not to exceed one second (the duration of the Timer will be announced to Members through a Regulatory Circular), in order to allow Market Makers and other participants an opportunity to interact with the initiating order. *See* Exchange Rule 529.

[29] The System will pause the market for a time period not to exceed one second to allow additional orders or quotes refreshing the liquidity at the MBBO to be received ("liquidity refresh pause") when at the time of receipt or reevaluation of the initiating order by the System: (A) Either the initiating order is a limit order whose limit price crosses the NBBO or the initiating order is a market order, and the limit order or market order could only be partially executed; (B) a Market Maker quote was all or part of the MBBO when the MBBO is alone at the NBBO; and (C) and the Market Maker quote was exhausted. *See* Exchange Rule 515(c)(2).

[30] This definition is consistent with that of another options exchange. *See* BOX Rule 7240(a)(6). The BOX rule differs from proposed Rule 518(a)(16), which defines the Strategy Book, in that BOX refers to the book as the "Complex Order Book" and also refers to the BOX Trading Host.

[31] *See* Exchange Rule 516.

[32] For a complete description of these order types, *see* Exchange Rule 516. The Exchange is not proposing to offer fill-or-kill complex orders, as currently offered on other exchanges. The Exchange does not believe that a fill-or-kill order is a critical order type for effective complex order trading. *See e.g.*, CBOE Rule 6.53C(b), which differs slightly from proposed Rule 518(b) in that the CBOE rule states that orders may also be entered as fill-or-kill or as all-or-none (the Exchange does not accept all-or-none orders); and BOX Rule 7240(b)(4)(i), which differs slightly from proposed Rule 518(b) in that the BOX rule states that orders may also be entered as fill-or-kill or as "Session" orders.

[33] The Exchange believes that this gives market participants extra flexibility to control the handling and execution of their complex orders by the System by giving them the additional ability to determine not to have their complex order initiate a Complex Auction by electing not to designate it as a cAOA order. This differs slightly from CBOE Rule 6.53[sic](d)(ii)(B), which requires CBOE Trading Permit Holders to affirmatively request, on an order-by-order basis, that a COA-eligible order with two legs not be placed into a CBOE Complex Order Auction (a "do-not-COA" request). The MIAX System considers an order not designated as cAOA to be ineligible to initiate an auction by default.

[34] *See* Proposed Rule 518(c). *See also* CBOE Rule 6.53C(c)(i), which states that CBOE will determine which classes and which complex order origin types (*i.e.*, non-broker-dealer public customer, broker-dealers that are not Market-Makers or specialists on an options exchange, and/or Market-Makers or specialists on an options exchange) are eligible for entry into the Complex Order Book.

[35] *See* Proposed Rule 518(c)(1). *See also* ISE Rule 722(b)(1), which is slightly distinguished from proposed Rule 518(c)(1) because it states that bids and offers on complex orders may be expressed in any decimal price, and the leg(s) of a complex order may be executed in one cent increments, regardless of the minimum increments otherwise applicable to the individual legs of the order.

Additionally, respecting execution pricing, proposed Rule 518(c)(1)(iii) states generally that a complex order will not be executed at a net price that would cause any component of the complex strategy to be executed: (A) At a price of zero; or (B) ahead of a Priority Customer order on the Simple Order Book without improving the MBBO of at least one component of the complex strategy. The Exchange will never trade through Priority Customer orders, thus protecting the priority that is established in the Simple Order Book.

Execution of Complex Orders and Quotes

Proposed Rule 518(c)(2) describes the process of the opening of the Strategy Book (and reopening after a halt) for trading, prices at which executions may occur on the Exchange for complex strategies, execution of complex orders against the individual components or "legs" on the Simple Order Book, the automatic generation of derived orders, and the process of evaluation that is conducted by the System on an ongoing basis respecting complex orders.

Proposed Rule 518(c)(2)(i) states that complex orders and quotes do not participate in the opening process for the individual option legs conducted pursuant to Rule 503.[37] At the beginning of each trading session, and upon reopening after a halt, once all components of a complex strategy are open, an initial evaluation will be conducted in order to determine whether a complex order is a Complex Auction-eligible order, using the process and criteria described in Interpretations and Policies .03(a) of proposed Rule 518 regarding the Initial Improvement Percentage ("IIP"). The IIP is used to calculate a percentage of the dcMBBO bid/ask differential at or within which the System will determine to initiate a Complex Auction when the Strategy Book opens for trading.[38] If a Complex Auction-eligible order is priced equal to, or improves, the IIP value and is also priced equal to, or improves, other complex orders and/or quotes resting at the top of the Strategy Book, the complex order will be eligible to initiate a Complex Auction.

The purpose of this provision is to ensure that a complex order will not initiate a Complex Auction if it does not improve the current complex bid or offer by at least a defined percentage (*i.e.*, the IIP) where it is not reasonable to anticipate that it would generate a meaningful number of RFR Responses such that there would be improvement of the complex order's limit price. Promoting the orderly initiation of a Complex Auction is essential to maintaining a fair and orderly market for complex orders; otherwise, the initiation of Complex Auctions that are unlikely to result in price improvement might result in a disproportionate amount of quote and message activity that could affect the orderliness of the market. The Exchange believes that the use of the IIP in this manner ensures that a Complex Auction will be conducted when there is a meaningful opportunity for price improvement, and accordingly will benefit participants and investors that submit complex orders to the Exchange by limiting unnecessary activity on the Exchange.

The System will also evaluate the eligibility of complex orders and quotes (as applicable) to participate in the managed interest process for complex orders as set forth in proposed Rule 518(c)(4) and described below; if they are eligible for full or partial execution against a complex order or quote resting on the Strategy Book or through Legging with the Simple Order Book as set forth in proposed Rule 518(c)(2)(iii) and described below; whether the complex order or quote should be cancelled; and whether all or any remaining portion of the complex order or quote should be placed on the Strategy Book. This evaluation process is ongoing and is designed to handle complex orders in the most efficient manner possible as market conditions change. The various outcomes are determined at the time of evaluation based on then-existing market conditions, which are continually evolving and require such evaluation for determination of the System's handling of complex orders.

The Strategy Book will open for trading, or reopen for trading after a halt, with a Complex Auction if it is determined that one of the following conditions is present: (A) A complex order with no matching interest on the Strategy Book equals or improves the IIP, (B) matching interest exists at a price that is equal to or through the IIP, or (C) a size imbalance exists where the price at which the maximum quantity that can trade is equal to or through the IIP. If the Strategy Book contains matched interest or a size imbalance exists where the price at which the maximum quantity can trade is not equal to or through the IIP, the Strategy Book will open for trading with a trade and a Complex Auction will not be initiated. The remaining portion of any complex order for which there is a size imbalance will be placed on the Strategy Book. If the Strategy Book contains no matching interest or interest equal to or through the IIP, the complex strategy will open without a trade and a Complex Auction will not be initiated.

Proposed Rule 518(c)(2)(ii) describes the manner in which the System determines the price of execution of complex orders and quotes. Incoming complex orders and quotes will be executed by the System in accordance with the provisions below, and will not be executed at prices inferior to the icMBBO or at a price that is equal to the icMBBO when there is a Priority Customer Order (as defined in Rule 100)[39] at the best icMBBO price. Complex orders will never be executed at a price that is outside of the individual component prices on the Simple Order Book. Furthermore, the net price of a complex order executed against another complex order on the Strategy Book will never be inferior to the price that would be available if the complex order legged into the Simple Order Book. The purpose of this provision is to prevent a component of a complex order from being executed at a price that is inferior to the best-priced contra-side orders or quotes on the

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[36] *See* Proposed Rule 518(c)(1)(ii). *See also*, ISE Rule 722(b)(2), which states that in this situation at least one leg must trade at a price that is better by at least one minimum trading increment, and PHLX Rule 1098(c)(iii), requiring in this situation that at least one option leg is executed at a better price than the established bid or offer for that option contract and no option leg is executed at a price outside of the established bid or offer for that option contract.

[37] This is similar to the opening of complex orders on other exchanges. Complex Orders on PHLX will not open for trading until each option component of a Complex Order Strategy has opened or reopened following a trading halt. *See* PHLX Rules 1098(d)(i) and (ii). Similarly, complex orders on NYSE MKT do not participate in the opening Auction Process for individual component option series legs conducted pursuant to Rule 952NY. The NYSE MKT Complex Matching Engine will not process an Electronic Complex Order until all of the individual component option series that make up a complex order strategy have opened. *See* NYSE MKT Rule 980NY(c)(i)(A).

[38] Similarly, as discussed more fully below, the System will also calculate an Upon Receipt Improvement Percentage ("URIP") value to determine whether a complex order is priced equal to, or improves, the URIP value upon receipt when the complex strategy is open for trading, and a Re-evaluation Improvement Percentage ("RIP") value, to determine whether a complex order resting at the top of the Strategy Book is priced equal to, or improves, the RIP value. If so, in either case, the complex order will be Complex Auction-eligible. *See* Proposed Rule 518, Interpretations and Policies .03(b) and (c).

[39] The term "Priority Customer" means a person or entity that (i) is not a broker or dealer in securities and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial accounts(s). The term "Priority Customer Order" means an order for the account of a Priority Customer. *See* Exchange Rule 100.

Simple Order Book (on which the icMBBO is based) and to prevent a component of a complex order from being executed at a price that compromises the priority already established by a Priority Customer on the Simple Order Book. The Exchange believes that such priority should be protected and that such protection should be extended to the execution of complex orders on the Strategy Book.[40]

Incoming complex orders that could not be executed because the executions would be priced (A) outside of the icMBBO, or (B) equal to or through the icMBBO due to a Priority Customer Order at the best icMBBO price, will be cancelled if such complex orders are not eligible to be placed on the Strategy Book. Complex orders and quotes will be executed without consideration of any prices for the complex strategy that might be available on other exchanges trading the same options contracts provided, however, that such complex order price may be subject to the Implied Exchange Away Best Bid or Offer ("ixABBO") Protection set forth in Interpretations and Policies .05(d) proposed Rule 518.[41]

Proposed Rule 518(c)(2)(iii) describes the Legging process through which complex orders, under certain circumstances, are executed against the individual components of a complex strategy on the Simple Order Book. Complex orders up to a maximum number of legs (determined by the Exchange on a class-by-class basis as either two or three legs and communicated to Members via Regulatory Circular) may be automatically executed against bids and offers on the Simple Order Book for the individual legs of the complex order ("Legging"), provided the complex order can be executed in full or in a permissible ratio by such bids and offers, and provided that the execution price of each component is not executed at a price that is outside of the NBBO.[42]

Legging is not available for cAOC orders, complex Standard quotes, complex eQuotes, or stock-option orders. The benefit of Legging against the individual components of a complex order or quote on the Simple Order Book is that complex orders can access the full liquidity of the Exchange's Simple Order Book, thus enhancing the possibility of executions at the best available prices on the Exchange.

Notwithstanding the foregoing, the Exchange is proposing to establish, in proposed Rule 518(c)(2)(iii), that complex orders that could otherwise be eligible for Legging will only be permitted to trade against other complex orders in the Strategy Book in certain situations.

Specifically, proposed Rule 518(c)(2)(iii) would provide that complex orders with two option legs where both legs are buying or both legs are selling and both legs are calls or both legs are puts may only trade against other complex orders on the Strategy Book and will not be permitted to leg into the Simple Order Book. Similarly, proposed Rule 518(c)(2)(iii) would impose a similar restriction by stating that complex orders with three option legs where all legs are buying or all legs are selling may only trade against other complex orders on the Strategy Book (regardless of whether the option leg is a call or a put).[43] The System will not generate derived orders for these complex orders.

Currently, Market Makers in the Simple Order Book are protected from undue risk of executions by way of the Aggregate Risk Manager ("ARM")[44] by limiting the number of contracts they execute in an option class on the Exchange within a specified time period (a "specified time period"). ARM automatically cancels and removes the Market Maker's Standard quotes from the Exchange's disseminated quotation in all series of a particular option class when it has determined that a Market Maker has traded a number of contracts equal to or above a percentage of their quotations (the "Allowable Engagement Percentage" or "AEP") during the specified time period. The purpose of ARM is to allow Market Makers to provide liquidity across potentially hundreds of options series without executing the full cumulative size of all such quotes before being given adequate opportunity to adjust the price and/or size of their quotes.

All of a Market Maker's quotes in each option class are considered firm until such time as the AEP threshold has been equaled or exceeded and the Market Maker's quotes are removed by ARM in all series of that option class.[45] Thus the Legging of complex orders presents higher risk to Market Makers as compared to simple orders being entered in multiple series of an options class in the simple market, as it can result in Market Makers exceeding their established AEP by a greater number of contracts. Although Market Makers can limit their risk through the use of ARM, the Market Maker's quotes are not removed until after a trade is executed. As a result, because of the way complex orders leg into the regular market as a single transaction, Market Makers may end up trading more than the cumulative AEP they have established, and are therefore exposed to greater risk. The Exchange believes that Market Makers may be compelled to change their quoting and trading behavior to account for this additional risk by widening their quotes and reducing the size associated with their quotes, which would diminish the Exchange's quality of markets and the quality of the markets in general.

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[40] Other exchanges protect Priority and Public Customer priority. ISE Priority Customer Orders on the Exchange shall have priority over Professional Orders and market maker quotes at the same price in the same options series. *See* ISE Rule 713(c). *See also*, CBOE Rule 6.45A(a)(i)(1), which states that CBOE Public customer orders in the electronic book have priority, and NYSE MKT Rule 964NY(b)(2)(A), which provides that bids and offers in the Consolidated Book for Customer accounts have first priority over other bids or offers at the same price.

[41] The ixABBO price protection feature is a price protection mechanism under which, when in operation as requested by the submitting Member, a buy order will not be executed at a price that is higher than each other single exchange's best offer, and under which a sell order will not be executed at a price that is lower than each other single exchange's best bid for the complex strategy. The ixABBO is calculated using the best net bid and offer for a complex strategy using each other exchange's displayed best bid or offer on their version of the Simple Order Book. For stock-option orders, the ixABBO for a complex strategy will be calculated using the BBO for each component on each individual away options market and the NBBO for the stock component. The ixABBO price protection feature must be engaged on an order-by-order basis by the submitting Member and is not available for complex Standard quotes, complex eQuotes, or cAOC orders. The Exchange believes that these limitations on the execution price provide a price protection option for Members that choose to place the ixABBO protection in operation.

[42] *See* proposed Rule 518(c)(2)(iii). This is similar to CBOE Rule 6.53C(c)(ii)(1), which states that complex order in the COB will automatically execute against individual orders or quotes residing in the EBook provided the complex order can be executed in full (or in a permissible ratio) by the orders and quotes in EBook; *see also* BOX Rule 7240(b)(3)(ii) providing that Complex Orders will be automatically executed against bids and offers on the BOX Book for the individual legs of the Complex Order to the extent that the Complex Order can be executed in full or in a permissible ratio by such bids and offers. Legging is not available on the Exchange for cAOC orders, complex Standard quotes, complex eQuotes, or stock-option orders.

[43] This is substantially similar to ISE Rules 722(b)(3)(ii)(A) and (B), which state that Complex orders with 2 option legs where both legs are buying or both legs are selling and both legs are calls or both legs are puts may only trade against other complex orders in the complex order book. The trading system will not generate legging orders for these complex orders, and complex orders with 3 or 4 option legs where all legs are buying or all legs are selling may only trade against other complex orders in the complex order book. *See also*, Securities Exchange Act Release No. 73023 (September 9, 2014), 79 FR 55033 (September 15, 2014)(SR–ISE–2014–10). This differs slightly from the Exchange's proposal because the Exchange's proposal applies to complex orders with two option legs in the same manner as the ISE rule, but applies to complex orders with three option legs (instead of three or four legs) where all legs are buying or all legs are selling, regardless of whether the option leg is a call or a put.

[44] *See* Exchange Rule 612.

[45] *See* Exchange Rule 612(c).

The purpose of the limitations in proposed Rule 518(c)(2)(iii) is to minimize the impact of Legging on single leg Market Makers by limiting a potential source of unintended Market Maker risk when certain types of complex orders leg into the Simple Order Book. The Exchange believes that the proposed limitation on the availability of Legging to (i) complex orders with two option legs where both legs are buying or both legs are selling and both legs are calls or both legs are puts, and (ii) complex orders with three option legs where all legs are buying or all legs are selling regardless of whether the option leg is a call or a put, should serve to reduce the risk of Market Makers trading above their risk tolerance levels.

Proposed Rule 518(c)(2)(iv) states that derived orders, as described above, may be automatically generated on behalf of complex orders so that they are represented at the best bid or offer on the Exchange for the individual legs, and shall be executed as provided in proposed Rule 518(a)(9), described above.

Proposed Rule 518(c)(2)(v) sets forth the process for evaluation of complex orders and quotes, and the Strategy Book, on a regular basis and for various conditions and events that result in the System's particular handling and execution of complex orders and quotes in response to such regular evaluation, conditions and events. The System will evaluate complex orders and quotes initially once all components of the complex strategy are open as set forth in proposed Rule 518(c)(2)(i) as described above, upon receipt as set forth in proposed Rule 518(c)(5)(i) as described below, and continually as set forth in proposed Rule 518(c)(5)(ii) as described below.[46]

The purpose of the evaluation process for complex orders and quotes is to determine (A) their eligibility to initiate, or to participate in, a Complex Auction as described in proposed Rule 518(d)(1) below; (B) their eligibility to participate in the managed interest process as described in proposed Rule 518(c)(4) below; (C) whether a derived order should be generated or cancelled; (D) if they are eligible for full or partial execution against a complex order or quote resting on the Strategy Book or through Legging with the Simple Order Book (as described in proposed Rule 518(c)(2)(iii) above); (E) whether the complex order or quote should be cancelled; and (F) whether the complex order or quote or any remaining portion thereof should be placed or remain on the Strategy Book.

The Exchange notes that, while the rules of other exchanges do not include descriptions of the evaluation process with the same level of detail and specificity as the rules concerning the evaluation process in proposed Rule 518, such a process occurs on trading systems on other exchanges. For example, the CBOE system evaluates its book in a similar manner to the proposed evaluation of the Strategy Book when determining how to execute complex orders.[47] PHLX evaluates the opening price and whether or not a trade can take place.[48] ISE evaluates price limits for complex orders and quotes both on ISE and on away exchanges, outside of which they will either not be executed or will be rejected outright before entering the ISE system.[49] The evaluation process is thus not a novel or unique concept; the Exchange is simply codifying it so that Members will know precisely how their complex orders are evaluated and handled by the System. The Exchange believes that this transparency provides Members with the necessary details concerning the manner in which the Strategy Book and their complex orders are evaluated.

The continual and event-triggered evaluation process ensures that the System is monitoring and assessing the Strategy Book for incoming complex orders and quotes, and changes in market conditions or events that cause complex orders to become due for execution or Complex Auction-eligible, and conditions or events that result in the cancellation of complex orders on the Strategy Book. This ensures the integrity of the Exchange's System in handling complex orders and results in a fair and orderly market for complex orders on MIAX.

Complex Order Priority

Proposed Rule 518(c)(3) describes how the system will establish priority for complex orders. The proposed complex order priority structure is based generally on the same approach and structure currently effective on MIAX respecting priority of orders and quotes in the simple market as established in Exchange Rule 514.[50] A complex order may be executed at a net credit or debit price with one other Member without giving priority to bids or offers established in the marketplace that are no better than the bids or offers comprising such net credit or debit; provided, however, that if any of the bids or offers established in the marketplace consist of a Priority Customer Order, at least one leg of the complex order must trade at a price that is better than the corresponding bid or offer in the marketplace by at least a $0.01 increment.[51] Under the circumstances described above, if a stock-option order has one option leg, such option leg has priority over bids and offers established in the marketplace by Professional Interest (as defined in Rule 100) [52] and Market Makers with priority quotes [53] that are no better than the price of the options leg, but not over such bids and offers established by Priority Customer Orders. If a stock-option order has more than one option leg, such option legs may be executed in accordance with proposed Rule 518(c)(3)(i).

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[46] Other exchanges' systems conduct evaluations as well. For example, PHLX conducts an opening "COOP Evaluation" to determine, for a Complex Order Strategy, the price at which the maximum number of contracts can trade, taking into account Complex Orders marked all-or-none (which will be executed if possible) unless the maximum number of contracts can only trade without including all-or-none orders. *See, e.g.,* PHLX Rule 1098(d)(ii)(C).

[47] A similar evaluation takes place in that a complex order in the CBOE Complex Order Book will automatically execute against individual orders or quotes residing in the EBook (simple orders) provided the complex order can be executed in full (or in a permissible ratio) by the orders and quotes in EBook; complex orders in the COB that are marketable against each other will automatically execute. *See* CBOE Rules 6.53[sic](c)(ii)(1) and (2).

[48] Upon expiration of the Complex Order Opening Process Timer, the PHLX system will conduct a COOP Evaluation to determine, for a Complex Order Strategy, the price at which the maximum number of contracts can trade, taking into account Complex Orders marked all-or-none (which will be executed if possible) unless the maximum number of contracts can only trade without including all-or-none orders. The PHLX will open the Complex Order Strategy at that price, executing marketable trading interest, in the following order: first, to non-broker-dealer customers in time priority; next to Phlx electronic market makers on a pro rata basis; and then to all other participants on a pro rata basis. The imbalance of Complex Orders that are unexecutable at that price are placed on the CBOOK. If at the end of the COOP Timer the System determines that no market or marketable limit Complex Orders or COOP Sweeps, Complex Orders or COOP Sweeps that are equal to or improve the cPBBO, and/or Complex Orders or COOP Sweeps that cross within the cPBBO exist in the System, all Complex Orders received during the COOP Timer will be placed on the CBOOK. If at the end of the COOP Timer the System determines that there are market or marketable limit Complex Orders or COOP Sweeps, Complex Orders or COOP Sweeps that are equal to or improve the cPBBO, and/or Complex Orders or COOP Sweeps that cross within the cPBBO in the System, the System will do the following: if such interest crosses and does not match in size, the execution price is based on the highest (lowest) executable offer (bid) price when the larger sized interest is offering (bidding), provided, however, that if there is more than one price at which the interest may execute, the execution price when the larger sized interest is offering (bidding) is the midpoint of the highest (lowest) executable offer (bid) price and the next available executable offer (bid) price rounded, if necessary, down (up) to the closest minimum trading increment. If the crossing interest is equal in size, the execution price is the midpoint of lowest executable bid price and the highest executable offer price, rounded, if necessary, up to the closest minimum trading increment. Executable bids/offers include any interest which could be executed at the net price without trading through residual interest or the cPBBO or without trading at the cPBBO where there is non-broker-dealer customer interest at the best bid or offer for any leg, consistent with Rule 1098(c)(iii). *See* PHLX Rule 1098(d)(ii)(C).

[49] ISE evaluates, among other things, prices at which complex orders are eligible or ineligible for execution. The legs of a complex order may be executed at prices that are inferior to the prices available on other exchanges trading the same options series. Notwithstanding, the ISE System will not permit any leg of a complex order to trade through the NBBO for the series by a configurable amount calculated as the lesser of (i) an absolute amount not to exceed $0.10, and (ii) a percentage of the NBBO not to exceed 500%, as determined by the Exchange on a class or series basis. A Member can also include an instruction on a complex order entered on the complex order book that each leg of the complex order is to be executed only at a price that is equal to or better than the national best bid or offer for the options series or any stock component, as applicable. The ISE System evaluates complex orders for rejection. ISE will reject any complex order strategy where all legs are to buy if it is entered at a price that is less than the minimum price, which is calculated as the sum of the ratio on each leg of the complex order multiplied by $0.01 per leg (*e.g.,* an order to buy 2 calls and buy 1 put would have a minimum price of $0.03). *See* ISE Rule 722, Supplementary Material .07.

Regarding execution and allocation of complex orders, proposed Rule 518(c)(3)(ii) establishes that complex orders will be automatically executed against bids and offers on the Strategy Book in price priority. Bids and offers at the same price on the Strategy Book will be executed pursuant to the following priority rules: (A) Priority Customer complex orders resting on the Strategy Book will have first priority to trade against a complex order. Priority Customer complex orders resting on the Strategy Book will be allocated in price time priority; (B) Market Maker Priority Interest for Complex will collectively have second priority. Market Maker Priority Interest for Complex will be allocated on a pro-rata basis as defined in Rule 514(c)(2); (C) Market Maker non-Priority Interest for Complex will collectively have third priority. Market Maker non-Priority Interest for Complex will be allocated on a pro-rata basis as defined in Rule 514(c)(2); (D) Non-Market Maker Professional Interest orders resting on the Strategy Book will collectively have fourth priority. Non-Market Maker Professional Interest orders will be allocated on a pro-rata basis as defined in Rule 514(c)(2).[54]

Managed Interest Process for Complex Orders

In order to ensure that complex orders (which are non-routable) receive the best executions on the Exchange, proposed Rule 518(c)(4), sets forth the price(s) at which complex orders will be placed on the Strategy Book. The managed interest process is initiated when a complex order that is eligible to be placed on the Strategy Book cannot be executed against either the Strategy Book or the Simple Order Book (with the individual legs) at the complex order's net price, and is intended to ensure that a complex order to be managed does not result in a locked or crossed market on the Exchange. Once initiated, the managed interest process for complex orders will be based upon the icMBBO.[55]

Under the managed interest process, a complex order that is resting on the Strategy Book and is either a complex market order as described in proposed Rule 518(c)(6) and discussed below, or has a limit price that locks or crosses the current opposite side icMBBO when the icMBBO is the best price, may be subject to the managed interest process for complex orders as discussed herein. Complex Standard quotes are not eligible for inclusion in the managed interest process. An unexecuted complex Standard quote with a limit price that would otherwise be managed to the icMBBO will be cancelled. If the order is not a Complex Auction-eligible order as defined in proposed Rule 518(d)(1) and described below, the System will first determine if the inbound complex order can be matched against other complex orders and/or quotes resting on the Strategy Book at a price that is at or inside the icMBBO (provided there are no Priority Customer orders on the Simple Order Book at that price). Second, the System will determine if the inbound complex order can be executed by Legging against individual orders and quotes resting on the Simple Order Book at the icMBBO. A complex order subject to the managed interest process will never be executed at a price that is through the individual component prices on the Simple Order Book. Furthermore, the net price of a complex order subject to the managed interest process that is executed against another complex order on the Strategy Book will never be inferior to the price that would be available if the complex order legged into the Simple Order Book. When the opposite side icMBBO includes a Priority Customer Order, the System will book and display such booked complex order on the Strategy Book at a price (the "book and display price") that is $0.01 away from the current opposite side icMBBO.

Example—*Complex order managed interest when Priority Customer Interest at the icMBBO is Present*

MIAX—LMM quote Mar 50 Call 6.00–6.50 (10x10)
MIAX—LMM quote Mar 55 Call 2.00–2.30 (10x10)
MIAX Priority Customer order Mar 55 Call 2.10 bid (1)

The Exchange receives an Initiating Customer buy complex order to purchase 1 Mar 50 Call and sell 2 Mar 55 Calls for a 2.30 debit, 100 times. The cAOA instruction is not present on this order, so the order will not initiate an auction upon arrival regardless of its relationship to the Improvement Percentage.

icMBBO is 1.40 debit bid at 2.30 credit offer

Since the Mar 55 call is 2.10 bid for only one contract (the MIAX Priority Customer order), the complex order cannot be legged against the Simple Order Book at a 2.30 debit as a 2.30 debit would require selling two March 55 Calls at 2.10 while buying one March 50 Call at 6.50. Since there is Priority

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[50] Exchange Rule 514, Priority of Quotes and Orders, describes among other things the various execution priority, trade allocation and participation guarantees generally applicable to the Simple Order Book. Some sections of Exchange Rule 514 are cross-referenced herein and will apply as noted to complex orders, as the context requires.

[51] *See* Proposed Rule 518(c)(3). *See also,* ISE Rule 722(b)(2), which states that in this situation at least one leg must trade at a price that is better by at least one minimum trading increment, and PHLX Rule 1098(c)(iii), requiring in this situation that at least one option leg is executed at a better price than the established bid or offer for that option contract and no option leg is executed at a price outside of the established bid or offer for that option contract.

[52] The term "Professional Interest" means (i) an order that is for the account of a person or entity that is not a Priority Customer or (ii) an order or non-priority quote for the account of a Market Maker. *See* Exchange Rule 100.

[53] *See* Exchange Rule 517(b)(1).

[54] In contrast, PHLX rules state that an incoming marketable Complex Order that does not trigger a COLA Timer will execute first against quotes or orders on the limit order book for the individual components of the order (whereas, under the instant proposal, outside of a Complex Auction the Exchange will first execute bids and offers at the same price on the Strategy Book), second, against non-broker-dealer customer Complex Orders and non-market maker broker-dealer Complex Orders resting in the CBOOK in price priority and, at the same price, against (i) non-broker-dealer customer Complex Orders in the order in which they were received; (ii) SQTs, RSQTs, non-SQT ROTs, specialists and non-PHLX market makers on another exchange on a size pro rata basis (whereas, under the instant proposal, the Exchange does not bundle all Market Makers in the same priority tier, and instead distinguishes between Market Maker Priority Interest, which is executed and allocated on a pro rata basis before Market Maker non-Priority Interest, which is thereafter executed and allocated on a pro rata basis); and (iii) non-market-maker broker-dealer Complex Orders on a size pro rata basis. *See* PHLX Rule 1098(f)(iii).

[55] A complex order for which the ixABBO protection is engaged will be managed to the ixABBO as described below and in proposed Rule 518, Interpretations and Policies .05(d).

Customer interest on one leg of the complex order on the Simple Order Book, the inbound complex order cannot trade at this price by matching with other complex liquidity. Thus, the order is managed for display purposes at a price one penny inside of the opposite side icMBBO, 2.29 and is available to trade with other complex liquidity at 2.29. Since there is no managed interest on the Simple Order Book, the icMBBO is equal to the dcMBBO in this case and remains 1.40 debit bid at 2.30 credit offer. The combination of the Simple Order Book and the Strategy Book will be a one penny wide market of 2.29 debit bid at 2.30 credit offer. If additional interest were to arrive on the Mar 55 Call 2.10 bid, the inbound complex order would be re-evaluated and would in this example become eligible to leg with the Priority Customer interest on the Simple Order Book at the 2.30 credit offer.

When the opposite side icMBBO does not include a Priority Customer Order and is not available for execution in the ratio of such complex order, or cannot be executed through Legging with the Simple Order Book, the System will place such complex order on the Strategy Book and display such booked complex order at a book and display price that will lock the current opposite side icMBBO because it is a price at which another complex order or quote can trade.

Example—*Complex Market order managed interest when Priority Customer Interest at the icMBBO is Present*

MIAX—LMM quote Mar 50 Call 6.00–6.50 (10x10)
MIAX—LMM quote Mar 55 Call 2.00–2.30 (10x10)
MIAX Priority Customer order Mar 55 Call 2.10 bid (1)

The Exchange receives an Initiating Customer buy complex order to purchase 1 Mar 50 Call and sell 2 Mar 55 Calls for a market debit, 100 times.

The cAOA instruction is not present on this order, so the order will not initiate an auction upon arrival regardless of its relationship to the IIP.

The icMBBO is 1.40 debit bid at 2.30 credit offer
The dcMBBO is 1.40 debit bid at 2.30 credit offer

Since the Mar 55 call is 2.10 bid for only one contract (the MIAX Priority Customer order), the complex order cannot be legged against the Simple Order Book at a 2.30 debit (the complex market order's assigned dcMBBO price), because a 2.30 debit would require selling two March 55 Calls at 2.10 while buying one March 50 Call at 6.50. Since there is Priority Customer interest on one leg of the complex order on the Simple Order Book, the inbound complex order cannot trade at this price by matching with other complex liquidity. Thus, the complex order is managed for display purposes at a price one penny inside of the opposite side icMBBO, 2.29 and is available to trade with other complex liquidity at 2.29. Since there is no managed interest on the Simple Order Book, the icMBBO is equal to the dcMBBO in this case and remains 1.40 debit bid at 2.30 credit offer. The combination of the Simple Order Book and the Strategy Book will be a one penny wide market of 2.29 debit bid at 2.30 credit offer.

If additional interest were to arrive on the Mar 55 Call 2.10 bid, the resting complex order would be re-evaluated and would in this example become eligible to leg with the icMBBO or dcMBBO since they are equal, which includes Priority Customer interest on the Simple Order Book at the 2.30 credit offer.

Example—*Complex order managed interest when the ratio to allow Legging does not exist, and there is no Priority Customer Interest*

MIAX—LMM quote Mar 50 call 6.00–6.50 (10x10)
MIAX—LMM quote Mar 55 call 2.00–2.30 (10x10)
MIAX Professional order Mar 55 Call 2.10 bid (1)

The Exchange receives an Initiating Customer buy complex order to purchase 1 Mar 50 call and sell 2 Mar 55 calls for a 2.30 debit, 100 times.

The icMBBO is 1.40 debit bid at 2.30 credit offer

The cAOA instruction is not present on this complex order, so the complex order will not initiate an auction upon arrival regardless of its relationship to the URIP.

Since the Mar 55 call is 2.10 bid for only one contract (the MIAX Professional order), the complex order cannot be legged against the Simple Order Book at a 2.30 debit, as a 2.30 debit would require selling two March 55 Calls at 2.10 while buying one March 50 Call at 6.50. Although the inbound complex order cannot trade at this time because there is insufficient interest to buy the March 55 Call, there is no Priority Customer interest on either side of the 2.30 credit offer and therefor the order will be able to trade at that price when sufficient interest exists. Thus, the order is managed for display purposes at a price locking the opposite side icMBBO 2.30 and is available to trade against other complex interest at 2.30. Since there is no managed interest on the Simple Order Book, the icMBBO is equal to the dcMBBO and remains 1.40 debit bid at 2.30 credit offer. The combination of the Simple Order Book and the Strategy Book will be a locked market of 2.30 debit bid at 2.30 credit offer.

Example—*Complex Market order managed interest when the ratio to allow Legging does not exist, and there is no Priority Customer Interest*

MIAX—LMM quote Mar 50 call 6.00–6.50 (10x10)
MIAX—LMM quote Mar 55 call 2.00–2.30 (10x10)
MIAX Professional order Mar 55 Call 2.10 bid (1)

The Exchange receives an Initiating Customer buy complex order to purchase 1 Mar 50 call and sell 2 Mar 55 calls for a market debit, 100 times.

The icMBBO is 1.40 debit bid at 2.30 credit offer
The dcMBBO is 1.40 debit bid at 2.30 credit offer

The cAOA instruction is not present on this order, so the order will not initiate an auction upon arrival regardless of its relationship to the URIP.

Since the Mar 55 call is 2.10 bid for only one contract (the MIAX Professional order), the complex order cannot be legged against the Simple Order Book at a 2.30 debit (the complex market order's assigned dcMBBO price), as a 2.30 debit would require selling two March 55 Calls at 2.10 while buying one March 50 Call at 6.50. Although the inbound complex order cannot trade at this time because there is insufficient interest to buy the March 55 Call, there is no Priority Customer interest on either side of the 2.30 credit offer and therefor the order will be able to trade at that price when sufficient interest exists. Thus, the complex order is managed for display purposes at a price locking the opposite side icMBBO which is equal to the dcMBBO at 2.30 and is available to trade against other complex interest at 2.30. Since there is no managed interest on the Simple Order Book, the icMBBO is equal to the dcMBBO and remains 1.40 debit bid at 2.30 credit offer. The combination of the Simple Order Book and the Strategy Book will be a locked market of 2.30 debit bid at 2.30 credit offer.

Should the icMBBO change, the complex order's book and display price will continuously re-price to the new icMBBO until (A) the complex order has been executed in its entirety; (B) if not executed, the complex order has been placed on the Strategy Book at prices up to and including its limit price or, in the case of a complex market order, at the new icMBBO; (C) the complex order has been partially executed and remaining unexecuted contracts have been placed on the Strategy Book at prices up to and including their limit price or, in the case of a complex market order, at the new icMBBO; or (D) the complex order or any remaining portion of the complex order is cancelled. If the Exchange receives a new complex order or quote for the complex strategy on the opposite side of the market from the managed complex order that can be executed, the System will immediately execute the remaining contracts from the managed complex order to the extent possible at the complex order's current book and display price, provided that the execution price is not outside of the current icMBBO. If unexecuted contracts remain from the complex order on the Strategy Book, the complex order's size will be revised and disseminated to reflect the complex order's remaining contracts at its current managed book and display price.

The purpose of using the calculated icMBBO is to enable the System to determine a valid trading price range for complex strategies and to protect orders resting on the Simple Order Book by ensuring that they are executed when entitled. Additionally, the managed interest process is designed to ensure that the System will not execute any component of a complex order at a price that would trade through an order on the Simple Order Book or that would disrupt the established priority of Priority Customer interest resting on the Simple Order Book.[56] The Exchange believes that this is reasonable because it prevents the components of a complex order from trading at a price that is inferior to a price at which the individual components may be traded on MIAX and it maintains the priority for Priority Customers resting on the Simple Order Book.

Evaluation Process

Proposed Rule 518(c)(5) describes how and when the System determines to execute or otherwise handle complex orders in the System. As stated above, the System will evaluate complex orders and quotes and the Strategy Book on a regular basis and to respond to the existence of various conditions and/or events that trigger an evaluation. Evaluation results in the various manners of handling and executing complex orders and quotes as described herein. The System will evaluate complex orders and quotes initially once all components of the complex strategy are open as set forth in proposed Rule 518(c)(2)(i) as described above, upon receipt as set forth in proposed Rule 518(c)(5)(i) as described below, and continually as set forth in proposed Rule(c)(5)(ii) as described below.

Proposed Rule 518(c)(5)(i) describes the evaluation process that occurs upon receipt of complex orders and quotes once a complex strategy is open for trading. After a complex strategy is open for trading, all new complex orders and quotes that are received for the complex strategy are evaluated upon arrival. The System will determine if such complex orders are Complex Auction-eligible orders, using the process and criteria regarding the Upon Receipt Improvement Percentage ("URIP") as described below.[57] The System will also evaluate (A) whether such complex orders or quotes are eligible for full or partial execution against a complex order or quote resting on the Strategy Book; (B) whether such complex orders or quotes are eligible for full or partial execution through Legging with the Simple Order Book (as described in proposed Rule 518(c)(2)(iii) and discussed above); (C) whether all or any remaining portion of a complex order or quote should be placed on the Strategy Book; (D) whether a derived order should be generated or cancelled; (E) the eligibility of such complex orders and quotes (as applicable) to participate in the managed interest process as described above;[58] and (F) whether such complex orders should be cancelled.

Proposed Rule 518(c)(5)(ii) describes the System's ongoing regular evaluation of the Strategy Book. The System will continue to evaluate complex orders and quotes on the Strategy Book to determine if such complex orders are Complex Auction-eligible orders, using the process and criteria described in Proposed Rule 518, Interpretations and Policies .03(c) regarding the Re-evaluation Improvement Percentage ("RIP") described below. The System will also continue, on a regular basis, to evaluate the factors listed in (A)–(F) above.

The System will also continue to evaluate whether there is a SMAT Event as defined above, a wide market condition (as described in Proposed Rule 518, Interpretations and Policies .05(e)(1) and discussed below), a halt (as described in proposed Rule 518, Interpretations and Policies .05(e)(3) and discussed below) affecting any component of a complex strategy. Complex orders and quotes will be handled during such events in the manner set forth in proposed Rule 518, Interpretations and Policies .05(e), as discussed below.

Proposed Rule 518(c)(5)(iii) states that if the System determines that a complex order is a Complex Auction-eligible order (described below), such complex order will be submitted into the Complex Auction process as described in proposed Rule 518(d) and discussed below.

Proposed Rule 518(c)(5)(iv) describes the handling of orders that are determined not to be Complex Auction-eligible. If the System determines that a complex order is not a Complex Auction-eligible order, such complex order may be, as applicable, immediately matched and executed against a complex order or quote resting on the Strategy Book; executed against the individual components of the complex order on the Simple Order Book through Legging (as described in proposed Rule 518(c)(2)(iii) above; placed on the Strategy Book and managed pursuant to the managed interest process as described in proposed Rule 518(c)(4) and discussed above; or cancelled by the System if the time-in-force (*i.e.,* IOC) of the complex order does not allow it to rest on the Strategy Book.

The Exchange is proposing to establish complex orders that may be submitted as market orders. Proposed Rule 518(c)(6) states that complex orders may be submitted as market orders and may be designated as cAOA. The proposed rule distinguishes between complex market orders designated as cAOA and those that are not so designated.

Proposed Rule 518(c)(6)(i) states that complex market orders designated as cAOA may initiate a Complex Auction upon arrival or join a Complex Auction in progress. The Complex Auction process is set forth in proposed Rule 518(d) and discussed below. Proposed Rule 518(c)(6)(ii), Complex Market Orders not Designated as cAOA, states that complex market orders not designated as cAOA will trade immediately with any contra-side complex orders or quotes, or against the individual legs, up to and including the dcMBBO, and may be subject to the managed interest process, and the Evaluation Process, each as described above.

Complex Auction Process

Proposed Rule 518(d), Complex Auction Process, describes the process for determining if a complex order is eligible to begin a Complex Auction, and to participate in a Complex Auction that is in progress. Certain option classes, as determined by the Exchange and communicated to Members via Regulatory Circular, will be eligible to participate in a Complex Auction (an "eligible class"). Upon evaluation as described above, the Exchange may determine to automatically submit a Complex Auction-eligible order (defined below) into a Complex Auction (as described below). Upon entry into the System or upon evaluation of a complex order resting at the top of the Strategy Book, Complex Auction-eligible orders may be subject to an automated request for responses ("RFR"), as described below.

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[56] For a complete description of priority in the Simple Order Book, *see* Exchange Rule 514.

[57] *See* proposed Rule 518, Interpretations and Policies .03(b).

[58] *See* proposed Rule 518(c)(4).

Proposed Rule 518(d)(1) defines and describes the handling of a Complex Auction-eligible order. A "Complex Auction-eligible order" means a complex order that, as determined by the Exchange, is eligible to initiate or join a Complex Auction based upon the order's marketability (*i.e.,* if the price of such order is equal to or within a specific range of the current dcMBBO) as established by the Exchange, number of components, and complex order origin types (*i.e.,* non-broker-dealer customers, broker-dealers that are not market makers on an options exchange, and/or market makers on an options exchange as established by the Exchange and communicated to Members via Regulatory Circular).[59] Exchange Market Makers have an obligation to provide liquidity on the Exchange, and the Exchange believes that it is not appropriate for Exchange Market Makers to submit orders intended to initiate Complex Auctions, and instead that they should provide liquidity via RFR Responses (described below) during the Response Time Interval (described below). Other exchanges also have limited auction eligibility for complex orders based on order origin type.[60]

In order to initiate a Complex Auction upon receipt, a Complex Auction-eligible order must be designated as cAOA and must meet the criteria described in proposed Rule 518, Interpretations and Policies .03(b) regarding the URIP as described below. A complex order not designated as cAOA (*i.e.,* a complex order considered by default to be "do not auction on arrival" by the System) may (i) join a Complex Auction in progress at the time of receipt; (ii) become a Complex Auction-eligible order after resting on the Strategy Book and may then automatically join a Complex Auction then in effect for the complex strategy; or (iii) initiate a Complex Auction if it meets the criteria described in proposed Rule 518, Interpretations and Policies .03(a) regarding the IIP or .03(c) regarding the RIP.

A complex order not designated as cAOA will still have execution opportunities. A complex order not designated as cAOA is deemed to be "do not auction on arrival" by the System by default. Such a complex order will still have the opportunity to execute upon entry into the System without initiating a Complex Auction. For example, such an order may execute automatically upon entry into the System by matching with complex orders and/or quotes resting on the Strategy Book at a price that is at or inside the icMBBO, or via Legging against the Simple Order Book to the extent they are marketable. Additionally, such an order on the opposite side of, and marketable against, a Complex Auction-eligible order may trade against the Complex Auction-eligible order if the System receives the order while a Complex Auction ongoing.[61]

Complex orders processed through a Complex Auction may be executed without consideration to prices of the same complex interest that might be available on other exchanges.

Proposed Rule 518(d)(2) describes the circumstances under which a Complex Auction is begun. Upon receipt of a Complex Auction-eligible order or upon an evaluation by the System indicating that there is a Complex Auction-eligible order resting on the Strategy Book, the Exchange may begin the Complex Auction process by sending an RFR message. The RFR message will be sent to all subscribers to the Exchange's data feeds that deliver RFR messages. The RFR message will identify the complex strategy, the price, quantity of matched complex quotes and/or orders at that price, imbalance quantity, and side of the market of the Complex Auction-eligible order. The inclusion of the quantity of matched complex quotes and/or orders at the price included in the RFR message is intended to inform participants considering submitting an RFR Response of the number of contracts for which there is matched interest, and the purpose of including the imbalance quantity in the RFR message is to inform such participants of the number of contracts that do not have matched interest. The Exchange believes that this level of detail should provide such participants with specific information about a Complex Auction in which they may decide to participate. The sum of the matched interest quantity and the imbalance quantity is equal to the size of the initiating Complex Auction-eligible order that is being auctioned.[62] The price included in the RFR message will be the limit order price, unless that price is through the opposite side dcMBBO or the Complex Auction is initiated by a complex market order, in which case such price will be the dcMBBO.

The Exchange may determine to limit the frequency of Complex Auctions for a complex strategy (*i.e.,* establish a minimum time period between Complex Auctions initiated for complex orders in that strategy resting on the Strategy Book). The duration of such limitation will be established on an Exchange-wide basis and communicated to Members via Regulatory Circular.[63] The Exchange will not change the duration of the minimum time period on an intra-day basis during any trading session. The purpose of this limitation is to safeguard the integrity of the System and to ensure an orderly market on the Exchange. The Exchange believes that it is possible that there could be multiple Complex Auctions commencing and in progress at any particular time, and that without such a limitation the Exchange could be inundated with Complex Auctions and that an unusually large number of simultaneous Complex Auctions could be disruptive to the orderly function of the System. Despite this limitation respecting orders resting on the Strategy Book, however, a new complex order received by the System during such limitation that ordinarily triggers a Complex Auction will still trigger a Complex Auction upon receipt.

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[59] *See also* NYSE MKT Rule 980NY(e)(1), which lists Customers, broker-dealers that are not Market-Makers or specialists on an options exchange, and/or Market-Makers or specialists on an options exchange.

[60] *See id. See also, e.g.,* CBOE Regulatory Circular RG14–143 (October 14, 2014), limiting Complex Order Auction ("COA") eligibility to non-broker-dealer public customer orders and professional customer orders.

[61] A MIAX complex order not designated as cAOA will not be considered a Complex Auction-eligible order by default. The Exchange believes that this gives market participants extra flexibility to control the handling and execution of their complex orders by the System by giving them the ability to determine affirmatively to have their complex order initiate a Complex Auction by way of the cAOA designation. In contrast, CBOE Rule 6.53C (d)(ii)(B) expressly states that Trading Permit Holders may request on an order by order basis that an incoming COA eligible order with two legs *not* COA (a "do not COA" request).

[62] *See also* NYSE MKT Rule 980NY(e)(2), which differs slightly because it includes size, but does not include an imbalance quantity or matched quantity, but states similarly that RFR messages will identify the component series and side of the market of the order and any contingencies.

[63] The frequency of auctions for complex orders is also limited on another exchange. *See, e.g.,* CBOE Rule 6.53C, Interpretations and Policies .04, which states that CBOE may also determine on a class-by-class and strategy basis to limit the frequency of COAs initiated for complex orders resting in COB.

Proposed Rule 518(d)(3) defines the amount of time within which participants may respond to an RFR message. The term "Response Time Interval" means the period of time during which responses to the RFR may be entered. The Exchange will determine the duration of the Response Time Interval, which shall not exceed 500 milliseconds, and will communicate it to Members via Regulatory Circular.[64]

Proposed Rule 518(d)(4) states that Members may submit a response to the RFR message (an "RFR Response") during the Response Time Interval. RFR Responses may be submitted in $0.01 increments. RFR Responses must be a cAOC order or a cAOC eQuote[65] (discussed below), and may be submitted on either side of the market. RFR Responses represent non-firm interest that can be modified or withdrawn at any time prior to the end of the Response Time Interval. At the end of the Response Time Interval, RFR Responses are firm (*i.e.*, guaranteed at the RFR price and size). All RFR Responses and other complex orders and quotes on the opposite side of the Complex Auction-eligible order are also firm with respect to other incoming Complex Auction-eligible orders that are received during the Response Time Interval. Any RFR Responses not executed in full will expire at the end of the Complex Auction.[66]

Proposed Rule 518(d)(5) describes how Complex Auction-eligible orders are handled following the Response Time Interval.

At the end of the Response Time Interval, Complex Auction-eligible orders (and other complex orders and quotes) may be executed in whole or in part. Complex Auction-eligible orders will be executed against the best priced contra side interest, and any unexecuted portion of a Complex Auction-eligible order remaining at the end of the Response Time Interval will either be evaluated to determine if it may initiate another Complex Auction, or placed on the Strategy Book and ranked pursuant to proposed Rule 518(c)(3) as discussed above.

The Complex Auction will terminate at the end of the Response Time Interval without trading when any individual component of a complex strategy in the Complex Auction process is subject to a wide market condition as described in proposed Rule 518, Interpretations and Policies .05(e)(1), or to a SMAT Event as described in proposed Rule 518(a)(16) and proposed Interpretations and Policies .05(e)(2), or immediately without trading if any individual component or underlying security of a complex strategy in the Complex Auction process is subject to a halt as described in proposed Rule 518, Interpretations and Policies .05(e)(3). Upon the conclusion of these condition(s) or process(es), an affected complex order will be evaluated and may initiate a new Complex Auction if such complex order is determined to be a Complex Auction-eligible order.

Example—*Complex Auction termination without trading due to a SMAT Event (a PRIME Auction) followed by a new Evaluation upon resolution of the PRIME Auction.*

MIAX—LMM Mar 50 Call 6.00–6.50 (10x10)
MIAX—LMM Mar 55 Call 3.00–3.30 (10x10)

The Exchange receives an Initiating Customer buy complex order to purchase 1 Mar 50 call and sell 1 Mar 55 call for a 3.20 debit, 1000 times. The cAOA instruction is present on this order, so the order will initiate an auction upon arrival if it equals or improves the URIP.

The icMBBO is 2.70 debit bid at 3.50 credit offer
The dcMBBO is 2.70 debit bid at 3.50 credit offer
The URIP Percentage is 60% of the bid/ask spread or 0.48

Since the order price exceeds the URIP requirement (2.70 + 0.48 = 3.18) to initiate an auction upon arrival, an RFR is broadcast to all subscribers showing price, the quantity of matched complex quotes and/or orders at that price, imbalance quantity, and side, and a 500 millisecond Response Time Interval is started.

The System starts the auction at the Initiating Priority Customer price bidding 3.20 to buy 1000 contracts. The following responses are received:

- @ 50 milliseconds BD1 response, cAOC Order @ 3.10 credit sell of 1000 arrives
- @ 150 milliseconds MM1 response, cAOC eQuote @ 3.00 credit sell of 500 arrives
- @ 200 milliseconds MM3 response, cAOC eQuote @ 3.20 credit sell of 500 arrives
- @ 250 milliseconds MM4 response, cAOC eQuote @ 3.10 credit sell of 250 arrives
- @ 350 milliseconds BD2 submits an unrelated complex order @ 2.70 credit sell of 200 arrives and joins the Complex Auction
- @ 400 milliseconds a PRIME Auction begins in either the Mar 50 Call or the Mar 55 Call

The Complex Auction process will continue until the Response Time Interval ends. When the 500 millisecond Response Time Interval ends,[67] the Complex Auction ends without a trade, because one component is in a PRIME Auction. All RFR Responses, cAOC orders and eQuotes are cancelled. The unrelated complex order to sell @ 2.70 credit is placed on the Strategy Book. If at the conclusion of the SMAT Event (PRIME Auction), the initiating Customer buy complex order to purchase 1 Mar 50 call and sell 1 Mar 55 call for a 3.20 debit is resting on the Complex book and available upon the next evaluation following the PRIME Auction an evaluation and a new Complex Auction can be initiated. Upon evaluation the initiating Customer complex order to buy 1000 @ 3.20 is now crossing the BD2 complex order to sell 200 @ 2.70. Because there is an imbalance the best price of the imbalance is used to determine if the imbalance price equals or improves the Re-evaluation Improvement Percentage (RIP).

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[64] Unlike other exchanges, the Exchange is not proposing a minimum Response Time Interval (*see* NYSEArca Rule 6.91, which establishes a minimum Response Time Interval of 500 milliseconds and a maximum of 1 second), and is limiting the Response Time Interval to a maximum of 500 milliseconds, whereas other exchanges have a maximum Response Time Interval of 100 milliseconds (*see* BOX Rule 7245(f)(1)) and others have a Response Time Interval of up to 3 seconds (*see* CBOE Rule 6.53C(d)(iii)(2)). The Exchange believes that 500 milliseconds is a reasonable amount of time within which participants can respond to an RFR message.

[65] A "Complex Auction or Cancel eQuote" or "cAOC eQuote" is an eQuote submitted by a Market Maker that is used to provide liquidity during a specific Complex Auction with a time in force that corresponds with the duration of the Complex Auction. *See* proposed Rule 518, Interpretations and Policies .02(c)(2)[sic]. cAOC eQuotes are not displayed to any market participant, are not included in the MBBO and therefore are not eligible for trading outside of the event (in this case the Complex Auction). A cAOC eQuote does not automatically cancel or replace the Market Maker's previous Standard quote or eQuote. *See* Exchange Rule 517(a)(2)(ii). The Exchange notes that any orders or quotes received by the System during the Complex Auction that are not cAOC orders or cAOC eQuotes will be treated as unrelated trading interest. In addition, the Exchange notes that a cAOC order or a cAOC eQuote could trade at a price inferior to the away market if it is a part of an exempt transaction. *See* Exchange Rule 1402.

[66] This differs slightly from, but has the same effect as, the language in CBOE Rule 6.53C(d)(vii), which states that any RFR Responses not accepted in whole or in a permissible ratio will expire at the end of the Response Time Interval.

[67] The Exchange will determine the duration of the Response Time Interval, which shall not exceed 500 milliseconds, and will communicate it to Members via Regulatory Circular. *See* proposed Rule 518(d)(3). All examples in this proposal assume a 500 millisecond Response Time Interval unless otherwise indicated.

MIAX—LMM Mar 50 Call 6.00–6.50 (10x10)
MIAX—LMM Mar 55 Call 3.00–3.30 (10x10)
The icMBBO is 2.70 debit bid at 3.50 credit offer
The dcMBBO is 2.70 debit bid at 3.50 credit offer
The URIP Percentage is 60% of the bid/ask spread or 0.48

Since the best order price on the imbalance side exceeds the RIP requirement (2.70 + 0.48 = 3.18) to initiate a new Complex Auction, an RFR message is broadcast to all subscribers showing the price, quantity of matched complex quotes and/or orders at that price, the imbalance quantity, and side and a 500 millisecond Response Time Interval is started.

The System starts the auction at the best imbalance price, in this case the Initiating Priority Customer price bidding 3.20 to buy 1000 strategies. In addition to the existing crossed interest of BD2 complex order to sell 200 @ 2.70 credit, the following responses are received:

- @ 50 milliseconds BD1 response, cAOC Order @ 3.20 credit sell of 400 arrives
- @ 150 milliseconds MM1 response, cAOC eQuote @ 3.10 credit sell of 200 arrives
- @ 200 milliseconds MM3 response, cAOC eQuote @ 3.15 credit sell of 200 arrives

The Complex Auction process will continue until the Response Time Interval ends. When the 500 millisecond Response Time Interval ends, the Complex Auction price determination will find the maximum quantity that can trade. In this case a single price of 3.20 satisfies the maximum quantity of 1000 and becomes the final auction price.

- Trade 1,000 at $3.20
- Customer buys 400 from BD1
- Customer buys 200 from BD2
- Customer buys 200 from MM1
- Customer buys 200 from MM3

Complex Auction Pricing

Proposed Rule 518(d)(6) describes the manner in which the System prices and executes complex orders and quotes at the conclusion of the Response Time Interval.

The proposed Rule initially states the broader pricing policy and functionality of all trading of complex orders in the System (whether a trade is executed in the Complex Auction process or in free trading). Specifically, a complex strategy will not be executed at a net price that would cause any component of the complex strategy to be executed: (A) At a price of zero; or (B) ahead of a Priority Customer order on the Simple Order Book without improving the MBBO on at least one component of the complex strategy by at least $.01.

At the conclusion of the Response Time Interval, using $0.01 inside the current icMBBO as the boundary (the "boundary"), the System will calculate the price where the maximum quantity of contracts can trade and also determine whether there is an imbalance. The purpose of using a boundary of $.01 inside the icMBBO as the Complex Auction price in this situation is to protect the Simple Order Book and to ensure that executions following the Response Time Interval are not blocked by a bid or offer on the Simple Order Book on the opposite side of the market for a component of a Complex strategy that will not satisfy the requisite ratio for the complex order.

Example—*Complex Auction takes place $.01 inside of the icMBBO to avoid a situation where nothing can trade and the incoming order cannot be satisfied at the Complex Auction price.*

MIAX—LMM Mar 50 Call 0.99–1.05 (10x10)
MIAX—LMM Mar 55 Call 0.80–0.95 (10x10)
MIAX Priority Customer order to buy a Mar 50 Call for 1.00 (2)

The Exchange receives an initiating Priority Customer complex order to sell 3 Mar 50 calls and buy 2 Mar 55 calls at a 1.10 credit, 100 times. The cAOA instruction is present on this complex order, so the complex order will initiate a Complex Auction upon arrival if it equals or improves the URIP.

The icMBBO is 1.10 debit at 1.55 credit
The dcMBBO is 1.10 debit at 1.55 credit
The URIP Percentage is 60% of the bid/ask spread or 0.27

Since the initiating Priority Customer order price exceeds the URIP requirement (1.55–0.27=1.28) to initiate a Complex Auction upon arrival, an RFR is broadcast showing price, the quantity of matched complex quotes and/or orders at that price, imbalance quantity, and side and a 500 millisecond Response Time Interval is started.

The System starts the Complex Auction at the initiating Priority Customer price offering to sell 100 strategies at 1.11. The following responses are received:

- @ 50 milliseconds MM1 response, cAOC eQuote to buy 100 @ 1.10 debit arrives
- @ 150 milliseconds MM4 response, cAOC eQuote to buy 50 @ 1.11 debit arrives
- @ 500 milliseconds the Response Time Interval expires, the Complex Auction ends and the trade is allocated against initiating Priority Customer using the single best price at which the greatest quantity can trade in the following manner:

1. 50 trade vs. MM4 @ 1.11
2. Nothing can trade at 1.10 due to the presence of Priority Customer interest in the March 50 Call on the Simple Order Book at 1.00 in insufficient quantity to meet the ratio required by the Priority Customer order. Therefore, the 1.10 cAOC response by MM1 expires untraded at the end of the Complex Auction and the balance of the initiating Priority Customer complex order to sell is placed on the Strategy Book at a managed and displayed price of 1.11

The Exchange begins Complex Auctions at a price that is $.01 inside of the icMBBO to protect the integrity of the Simple Order Book and to eliminate the possibility of beginning a Complex Auction at a price at which the order cannot execute.

No Imbalance at End of Response Time Interval

If there is no imbalance, and a single price satisfies the maximum quantity criteria, that single price is used as the Complex Auction price. If two or more prices satisfy the maximum quantity criteria, the System will calculate the midpoint of the lowest and highest price points that satisfy the maximum quantity criteria, such midpoint price is used as the Complex Auction price. For orders with ixABBO Price Protection, as described above, ("price protection"), the midpoint pricing will use the price protection range selected by the Member at the end of the Complex Auction. If the midpoint price is not in a $0.01 increment, the System will round toward the midpoint of the dcMBBO to the nearest $0.01. If the midpoint of the highest and lowest prices is also the midpoint of the dcMBBO and is not in a $0.01 increment, the System will round the price up to the next $0.01 increment.

Example—*Complex Auction Pricing when there is no imbalance and the maximum quantity at a single price is used as the Complex Auction price*

MIAX—LMM Mar 50 Call 6.00–6.50 (10x10)
MIAX—LMM Mar 55 Call 3.00–3.30 (10x10)

The Exchange receives an Initiating Customer buy complex order to purchase 1 Mar 50 call and Sell 1 Mar 55 call for a 3.20 debit, 1000 times. The cAOA instruction is present on this order, so the order will initiate an auction upon arrival if it equals or improves the URIP.

The icMBBO is 2.70 debit bid at 3.50 credit offer

The dcMBBO is 2.70 debit bid at 3.50 credit offer

The URIP Percentage is 60% of the bid/ask spread or 0.48 (60% x 0.80 = 0.48)

Since the order price exceeds the URIP requirement (2.70 + 0.48 = 3.18) to initiate an auction upon arrival, an RFR is broadcast to all subscribers showing price, the quantity of matched complex quotes and/or orders at that price, imbalance quantity, and side is sent and a 500 millisecond Response Time Interval is started.

The System starts the auction at the Initiating Priority Customer price bidding 3.20 to buy 1000 strategies. The following responses are received:

- @ 50 milliseconds BD1 response, cAOC Order @ 3.20 credit sell of 500 arrives
- @ 150 milliseconds MM1 response, cAOC eQuote @ 3.10 credit sell of 250 arrives
- @ 200 milliseconds MM3 response, cAOC eQuote @ 3.15 credit sell of 250 arrives

The Complex Auction process will continue until the Response Time Interval ends. When the 500 millisecond Response Time Interval ends, the Complex Auction price determination will find the maximum quantity that can trade. In this case a single price of 3.20 satisfies the maximum quantity of 1000 and becomes the final auction price.

- Trade 1,000 at $3.20
- Customer buys 500 from BD1
- Customer buys 250 from MM1
- Customer buys 250 from MM3

Example—*Complex Auction Pricing when there is no imbalance and the maximum quantity at two or more prices is used as the Complex Auction price.*

MIAX—LMM Mar 50 Call 6.00–6.50 (10x10)

MIAX—LMM Mar 55 Call 3.00–3.30 (10x10)

The Exchange receives an Initiating Customer buy complex order to purchase 1 Mar 50 Call and Sell 1 Mar 55 Call for a 3.20 debit, 1000 times. The cAOA instruction is present on this order, so the order will initiate an auction upon arrival if it equals or improves the URIP.

The icMBBO is 2.70 debit bid at 3.50 credit offer

The dcMBBO is 2.70 debit bid at 3.50 credit offer

The URIP Percentage is 60% of the bid/ask spread or 0.48 (60% x 0.80 = 0.48). Since the order price exceeds the URIP requirement (2.70+0.48=3.18) to initiate an auction upon arrival, an RFR is broadcast to all subscribers showing price, the quantity of matched complex quotes and/or orders at that price, imbalance quantity, and side is sent and a 500 millisecond Response Time Interval is started.

The System starts the auction at the Initiating Priority Customer price bidding 3.20 to buy 1000 strategies. The following responses are received:

- @ 50 milliseconds BD1 response, cAOC Order @ 3.10 credit sell of 500 arrives
- @ 150 milliseconds MM1 response, cAOC eQuote @ 3.10 credit sell of 250 arrives
- @ 200 milliseconds MM3 response, cAOC eQuote @ 3.10 credit sell of 250 arrives

The Complex Auction process will continue until the Response Time Interval ends. When the 500 millisecond Response Time Interval ends, the Complex Auction price determination will find the maximum quantity that can trade. In this case the maximum quantity of 1000 can trade at or within the prices of 3.10 and 3.20. To find the final trade price the process will continue by taking the midpoint between the highest and lowest price points that satisfy the maximum quantity, in this case is 3.15.

- Trade 1,000 at $3.15
- Customer buys 500 from BD1
- Customer buys 250 from MM1
- Customer buys 250 from MM3

Example—*Complex Auction Pricing when there is no imbalance and the maximum quantity at two or more prices is used as the Complex Auction price. If the midpoint price is not in a $0.01 increment, the System will round toward the midpoint of the dcMBBO to the nearest $0.01.*

MIAX—LMM Mar 50 Call 6.00–6.50 (10x10)

MIAX—LMM Mar 55 Call 3.00–3.30 (10x10)

The Exchange receives an Initiating Customer buy complex order to purchase 1 Mar 50 Call and Sell 1 Mar 55 Call for a 3.19 debit, 1000 times. The cAOA instruction is present on this order, so the order will initiate an auction upon arrival if it equals or improves the URIP.

The icMBBO is 2.70 debit bid at 3.50 credit offer

The dcMBBO is 2.70 debit bid at 3.50 credit offer

Midpoint of dcMBBO is the difference between the bid and offer divided by 2 added to the dcMBB or subtracted from the dcMBO:

- 2.70 + ((350 – 2.70) *.5) = 3.10 or
- 3.50 – ((3.50 – 2.70 *.5) = 3.10

The URIP Percentage is 60% of the bid/ask spread or 0.48 (60% × 0.80 = 0.48)

Since the order price exceeds the URIP requirement (2.70 + 0.48 = 3.18) to initiate an auction upon arrival, an RFR is broadcast to all subscribers showing price, the quantity of matched complex quotes and/or orders at that price, imbalance quantity, and side is sent and a 500 millisecond Response Time Interval is started.

The System starts the auction at the Initiating Priority Customer price bidding 3.19 to buy 1000 strategies. The following responses are received:

- @ 50 milliseconds BD1 response, cAOC Order @ 3.10 credit sell of 500 arrives
- @ 150 milliseconds MM1 response, cAOC eQuote @ 3.10 credit sell of 250 arrives
- @ 200 milliseconds MM3 response, cAOC eQuote @ 3.10 credit sell of 250 arrives

The Complex Auction process will continue until the Response Time Interval ends. When the 500 millisecond Response Time Interval ends, the Complex Auction price determination will find the maximum quantity that can trade. In this case the maximum quantity of 1000 can trade at or within the prices of 3.10 and 3.19. To find the final trade price the process will continue by taking the midpoint between the highest and lowest price points that satisfy the maximum quantity, in this case is 2.70 + ((3.19 – 3.10) *.5) = 3.145. Because the midpoint price is not 0.01 increment the trade price is rounded toward 3.10 the midpoint price of the dcMBBO to the nearest 0.01.

- Trade 1,000 at $3.14
- Customer buys 500 from BD1
- Customer buys 250 from MM1
- Customer buys 250 from MM3

Example—*Complex Auction Pricing when there is no imbalance and the maximum quantity at two or more prices is used as the Complex Auction price. If the midpoint of the highest and lowest prices is also the midpoint of the dcMBBO and is not in a $0.01 increment, the System will round the price up to the next $0.01 increment.*

MIAX—LMM Mar 50 Call 6.00–6.50 (10x10)

MIAX—LMM Mar 55 Call 3.01–3.30 (10x10)

The Exchange receives an Initiating Customer buy complex order to purchase 1 Mar 50 Call and Sell 1 Mar 55 Call for a 3.18 debit, 1000 times. The cAOA instruction is present on this order, so the order will initiate an auction upon arrival if it equals or improves the URIP.

The icMBBO is 2.70 debit bid at 3.49 credit offer

The dcMBBO is 2.70 debit bid at 3.49 credit offer

Midpoint of dcMBBO is the difference between the bid and offer times 0.5 added to the dcMBB or subtracted from the dcMBO:

- $2.70 + ((3.49 - 2.70) * 0.5) = 3.095$ or
- $3.49 - ((3.49 - 2.70 * 0.5) = 3.095$

The URIP Percentage is 60% of the bid/ask spread or 0.47 (60% × 0.79 = 0.47)

Since the order price exceeds the URIP requirement (2.70 + 0.47 = 3.17) to initiate an auction upon arrival, an RFR is broadcast to all subscribers showing price, the quantity of matched complex quotes and/or orders at that price, imbalance quantity, and side is sent and a 500 millisecond Response Time Interval is started.

The System starts the auction at the Initiating Priority Customer price bidding 3.18 to buy 1000 strategies. The following responses are received:

- @ 50 milliseconds BD1 response, cAOC Order @ 3.01 credit sell of 500 arrives
- @ 150 milliseconds MM1 response, cAOC eQuote @ 3.00 credit sell of 250 arrives
- @ 200 milliseconds MM3 response, cAOC eQuote @ 3.00 credit sell of 250 arrives

The Complex Auction process will continue until the Response Time Interval ends. When the 500 millisecond Response Time Interval ends, the Complex Auction price determination will find the maximum quantity that can trade. In this case the maximum quantity of 1000 can trade at or within the prices of 3.01 and 3.18. To find the final trade price the process will continue by taking the midpoint between the highest and lowest price points that satisfy the maximum quantity, in this case is $3.01 + ((3.18 - 3.01) * .5) = 3.095$. Because the midpoint of the highest and lowest price is also the midpoint of the dcMBBO and is not 0.01 increment the trade price is rounded up to the next 0.01 increment.

- Trade 1,000 at $3.10
- Customer buys 500 from BD1
- Customer buys 250 from MM1
- Customer buys 250 from MM3

Size Imbalance at End of Response Time Interval

If there is a size imbalance, and if a single price satisfies the maximum quantity criteria, that single price is used as the Complex Auction price. If two or more prices satisfy the maximum quantity criteria, the System will price the execution at the price on the opposite side of the size imbalance that meets the maximum quantity criteria, while also respecting limit prices and the pricing boundaries which include the price protection boundary of $0.01 inside of the icMBBO and the price protection range (if any) selected by the Members whose interest makes up the order imbalance.

Example—*Complex Auction Pricing when there is an imbalance and the maximum quantity at two or more prices are used as the Complex Auction price*

MIAX—LMM Mar 50 Call 6.00–6.50 (10x10)

MIAX—LMM Mar 55 Call 3.00–3.30 (10x10)

The Exchange receives an Initiating Customer buy complex order to purchase 1 Mar 50 Call and Sell 1 Mar 55 Call for a 3.20 debit, 1000 times. The cAOA instruction is present on this order, so the order will initiate an auction upon arrival if it equals or improves the URIP.

The icMBBO is 2.70 debit bid at 3.50 credit offer

The dcMBBO is 2.70 debit bid at 3.50 credit offer

The URIP Percentage is 60% of the bid/ask spread or 0.48 (60% × 0.80 = 0.48)

Since the order price exceeds the URIP requirement (2.70 + 0.48 = 3.18) to initiate an auction upon arrival, an RFR is broadcast to all subscribers showing price, the quantity of matched complex quotes and/or orders at that price, imbalance quantity, and side is sent and a 500 millisecond Response Time Interval is started.

The System starts the auction at the Initiating Priority Customer price bidding 3.20 to buy 1000 strategies. The following responses are received:

- @ 50 milliseconds BD1 response, cAOC Order @ 3.15 credit sell of 500 arrives
- @ 150 milliseconds MM1 response, cAOC eQuote @ 3.10 credit sell of 200 arrives
- @ 200 milliseconds MM3 response, cAOC eQuote @ 3.15 credit sell of 200 arrives

The Complex Auction process will continue until the Response Time Interval ends. When the 500 millisecond Response Time Interval ends, the Complex Auction price determination will find the maximum quantity that can trade. In this case the maximum quantity of 900 can trade at or within the prices of 3.15 and 3.20. Because there is more quantity to buy than to sell, this creates an imbalance therefore the final trade price does not use the midpoint and instead will be at the price on the opposite side of the size imbalance, in this case 3.20. After the Auction process has terminated, the remaining bid for a size of 100 will be placed on the Strategy Book at its limit price of 3.20.

- Trade 900 at $3.20
- Customer buys 500 from BD1
- Customer buys 200 from MM1
- Customer buys 200 from MM3
- Post $3.20 bid for 100

If, after trading the maximum quantity at the execution price, Complex Auction interest remains with a managed price that locks or crosses the opposite side icMBBO, the System will execute the individual legs of eligible remaining Complex Auction eligible orders and quotes against orders and quotes resting on the Simple Order Book that were present prior to the beginning of the Complex Auction at the icMBBO if available in the proper ratio and at or within the NBBO of each component of the complex order.

After executing the imbalance side interest to the extent possible at the icMBBO, and if Priority Customer interest at the icMBBO that is not in the proper ratio remains, the System will place such remaining imbalance side interest on the Strategy Book and manage such interest pursuant to proposed Rule 518(c)(4). If no Priority Customer interest at the icMBBO remains, the System will execute Complex Auction interest with any available complex orders, complex Standard quotes or complex eQuotes priced at the icMBBO, and then with any orders or quotes on the Simple Order Book at the icMBBO that were received or modified after the beginning of the Response Time Interval.

If after trading the maximum quantity at the initial icMBBO all interest at the initial icMBBO has been executed, including through Legging with the Simple Order Book (as described in proposed Rule 518(c)(2)(iii) above), and Complex Auction interest remains with a managed price that crosses the exhausted icMBBO or dcMBBO (if the next opposite side icMBBO is also the dcMBBO), or locks or crosses the next opposite side icMBBO or dcMBBO (if the next opposite side icMBBO is also the dcMBBO), the System will repeat the process for a size imbalance described in proposed Rule 518(d)(6)(i)(B)(1)–(3) above. At each icMBBO price level the System will repeat this process at the end of the Response Time Interval until reaching the dcMBBO price. If the Complex Auction price is equal to or crosses the dcMBBO and the dcMBBO is exhausted, the System will place any remaining Complex Auction interest on the Strategy Book and manage the interest that is eligible to rest on the Strategy Book pursuant to subparagraph (c)(4) to the exhausted dcMBBO price, cancel Complex Auction interest, including remaining complex order cAOC interest, that is not eligible to rest on the Strategy Book, and cancel any complex Standard quotes that are locking or crossing the exhausted dcMBBO price. The System will then immediately initiate a re-evaluation of the remaining interest from the Complex Auction and may initiate a new Complex Auction without regard to the RIP.

Example—*Remaining Complex Auction interest after trading the maximum quantity, that locks or crosses the opposite side icMBBO will leg against interest resting on the Simple Order Book*

ABBO—Mar 50 Call 6.20–6.30
MIAX—LMM Mar 50 Call 6.00–6.20 (10x100) managed offer
MIAX—LMM Mar 50 Call 6.00–6.30 (10x100) displayed offer
MIAX—LMM Mar 55 Call 3.00–3.30 (100x10)

The Exchange receives an Initiating Customer buy complex order to purchase 1 Mar 50 Call and Sell 1 Mar 55 Call for a 3.40 debit, 1000 times. The cAOA instruction is present on this order, so the order will initiate an auction upon arrival if it equals or improves the URIP.

The icMBBO is 2.70 debit bid at 3.20 credit offer
The dcMBBO is 2.70 debit bid at 3.30 credit offer
The URIP Percentage is 60% of the bid/ask spread or 0.36 (60% × 0.60 = 0.36)

Since the order price exceeds the URIP requirement (2.70 + 0.36 = 3.06) to initiate an auction upon arrival, an RFR is broadcast to all subscribers showing price, the quantity of matched complex quotes and/or orders at the Complex Auction price, imbalance quantity, and side is sent and a 500 millisecond Response Time Interval is started.

The System starts the auction at the Initiating Priority Customer price bidding 3.30 to buy 1000 strategies. The following responses are received:

- @ 50 milliseconds BD1 response, cAOC Order @ 3.15 credit sell of 500 arrives
- @ 150 milliseconds MM1 response, cAOC eQuote @ 3.10 credit sell of 200 arrives
- @ 200 milliseconds MM3 response, cAOC eQuote @ 3.15 credit sell of 200 arrives

The Complex Auction process will continue until the Response Time Interval ends. When the 500 millisecond Response Time Interval ends, the Complex Auction price determination will find the maximum quantity that can trade. In this case the maximum quantity of 900 can trade at or within the prices of 3.15 and 0.01 inside the icMBBO, which results in a boundary price of 3.19. Because there is more quantity to buy than to sell, this creates an imbalance therefore the final trade price does not use the midpoint and instead will be at the price on the opposite side of the size imbalance, in this case 3.19.

The remaining balance of 100 to buy at 3.40 will execute by Legging against interest resting on the Simple Order Book at the icMBBO price of $3.20 buy 100 of the LMM Mar 50 Call at 6.20 and sell 100 of the LMM Mar 55 Call at 3.00 for a net debit of 3.20.

- Trade 900 at $3.19
- Customer buys 500 from BD1
- Customer buys 200 from MM1
- Customer buys 200 from MM3
- Leg the balance against the $3.20 icMBBO
- Customer buys 100 of the Mar 50 Call at 6.20 from the LMM
- Customer sells 100 of the Mar 55 Call at 3.00 to the LMM

If the trading described above was not at the dcMBBO, the System will follow the same procedure at the dcMBBO. If after trading the maximum quantity at the dcMBBO, interest at the dcMBBO remains, the System will place any remaining Complex Auction interest on the Strategy Book and manage the interest that is eligible to rest on the Strategy Book pursuant to proposed Rule 518(c)(4), and cancel Complex Auction interest, including remaining complex order cAOC interest, that is not eligible to rest on the Strategy Book.

Example—*Complex Auction interest trades the maximum quantity at the initial icMBBO, and additional remaining interest locks or crosses the next opposite side icMBBO or dcMBBO (if the next opposite side icMBBO is also the dcMBBO) the system will repeat the process for a size imbalance*

MIAX—LMM Mar 50 Call 6.00–6.20 (10x10) managed offer
MIAX—LMM Mar 50 Call 6.00–6.30 (10x100) displayed offer
MIAX—LMM Mar 55 Call 3.00–3.30 (1000x10)

The Exchange receives an Initiating Customer buy complex order to purchase 1 Mar 50 Call and Sell 1 Mar 55 Call for a 3.40 debit, 1000 times. The cAOA instruction is present on this order, so the order will initiate an auction upon arrival if it equals or improves the URIP.

The icMBBO is 2.70 debit bid at 3.20 credit offer
The dcMBBO is 2.70 debit bid at 3.30 credit offer
The URIP Percentage is 60% of the bid/ask spread or 0.36 (60% x 0.60 = 0.36)

Since the order price exceeds the URIP requirement (2.70+0.36=3.06) to initiate an auction upon arrival, an RFR is broadcast to all subscribers showing price, the quantity of matched complex quotes and/or orders at that price, imbalance quantity, and side is sent and a 500 millisecond Response Time Interval is started.

The System starts the auction at the Initiating Priority Customer price bidding 3.30 (the opposite side dcMBBO) to buy 1000 strategies. The following responses are received:

- @ 50 milliseconds BD1 response, cAOC Order @ 3.15 credit sell of 500 arrives
- @ 150 milliseconds MM1 response, cAOC eQuote @ 3.10 credit sell of 200 arrives
- @ 200 milliseconds MM3 response, cAOC eQuote @ 3.15 credit sell of 200 arrives

The Complex Auction process will continue until the Response Time Interval ends. When the 500 millisecond Response Time Interval ends, the Complex Auction price determination will find the maximum quantity that can trade. In this case the maximum quantity of 900 can trade at or within the prices of 3.15 and 0.01 inside the icMBBO, which results in a boundary price of 3.19. Because there is more quantity to buy than to sell, this creates an imbalance therefore the final trade price does not use the midpoint and instead will be at the price on the opposite side of the size imbalance, in this case 3.19.

The remaining balance of 100 to buy at 3.40 will execute by Legging against interest resting on the Simple Order Book at the icMBBO that was present prior to the beginning of the Complex Auction. The complex order will in this case buy 10 of the LMM Mar 50 Call at 6.20 and sell 10 of the LMM Mar 55 Call at 3.00 for a net debit of 3.20 fully executing the initial icMBBO. With all interest at the initial icMBBO of 3.20 credit executed, Complex Auction interest remains to buy 90 at 3.40, and will follow the process for a size imbalance as described above and trade at the next icMBBO or in this case the dcMBBO since the next opposite side icMBBO is also the dcMBBO. The complex order will execute against by Legging interest resting on the Simple Order Book at the dcMBBO, in this case buy 90 of the LMM Mar 50 calls at 6.30 and sell 90 of the LMM Mar 55 calls at 3.00 for a net debit of 3.30.

- Trade 900 at $3.19
- Customer buys 500 from BD1
- Customer buys 200 from MM1
- Customer buys 200 from MM3
- Leg 10 against the $3.20 icMBBO
- Customer buys 10 of the Mar 50 calls at 6.20 from the LMM
- Customer sells 10 of the Mar 55 calls at 3.00 to the LMM
- Leg 90 against the $3.30 dcMBBO
- Customer buys 90 of the Mar 50 calls at 6.30 from the LMM
- Customer sells 90 of the Mar 55 calls at 3.00 to the LMM

Example—*When the icMBBO is also the dcMBBO, remaining Complex Auction interest that locks or crosses the opposite side dcMBBO will leg against interest resting on the Simple Order Book exhausting interest at the dcMBBO and then will be evaluated*

MIAX—LMM Mar 50 call 6.00–6.20 (10x10)

MIAX—LMM Mar 55 call 3.00–3.30 (1000x10)

The Exchange receives an Initiating Customer complex order to buy 1 Mar 50 call and Sell 1 Mar 55 call for a 3.30 debit, 1000 times. The cAOA instruction is present on this order, so the order will initiate an auction upon arrival if it equals or improves the URIP.

The icMBBO is 2.70 debit bid at 3.20 credit offer

The dcMBBO is 2.70 debit bid at 3.20 credit offer

The URIP Percentage is 60% of the bid/ask spread or 0.30 (60% x 0.50 = 0.30)

Since the order price exceeds the URIP requirement (2.70+0.30=3.00) to initiate an auction upon arrival, an RFR is broadcast to all subscribers showing price, the quantity of matched complex quotes and/or orders at that price, imbalance quantity, and side is sent and a 500 millisecond Response Time Interval is started.

The System starts the auction at the Initiating Priority Customer price bidding 3.20 (the opposite side dcMBBO) to buy 1000 contracts. The following responses are received:

- @ 50 milliseconds BD1 response, cAOC Order @ 3.15 credit sell of 500 arrives
- @ 150 milliseconds MM1 response, cAOC eQuote @ 3.10 credit sell of 200 arrives
- @ 200 milliseconds MM3 response, cAOC eQuote @ 3.15 credit sell of 200 arrives
- @ 225 milliseconds MM2 complex Standard quote bidding @ 3.20 debit buy of 200 arrives
- @ 400 milliseconds MM2 response, cAOC eQuote @ 3.40 credit sell of 200 arrives

The Complex Auction process will continue until the Response Time Interval ends. When the 500 millisecond Response Time Interval ends, the Complex Auction price determination will find the maximum quantity that can trade. In this case the maximum quantity of 900 can trade at or within the prices of 3.15 and 0.01 inside of the icMBBO, which results in a buy imbalance. Because there is more quantity to buy than to sell, this creates an imbalance therefore the final trade price does not use the midpoint and instead will be at the price on the opposite side of the size imbalance, in this case 3.19.

A portion of the remaining balance of 100 to buy at 3.30 will execute by Legging against interest resting on the Simple Order Book at the combined icMBBO/dcMBBO that was present prior to the beginning of the Complex Auction. The complex order will in this case buy 10 of the LMM Mar 50 Call at 6.20 and sell 10 of the LMM Mar 55 Call at 3.00 for a net debit of 3.20, exhausting the dcMBBO.

Once the dcMBBO has been exhausted and Auction interest remains, all unexecuted cAOC eQuotes or orders and any unexecuted complex Standard quotes that are locking or crossing the exhausted dcMBBO price are cancelled. This results in the cancellation of MM2's 3.40 credit cAOC response and MM2's 3.20 debit complex Standard quote bid.

Since the dcMBBO has been exhausted, the remaining balance of 90 contracts from the Initiating Priority Customer order will then be placed on the Strategy Book at the exhausted dcMBBO price.

The new Simple Market quotes after exhausting the original icMBBO/dcMBBO are:

MIAX—LMM Mar 50 Call 6.10–6.40 (10x10)

MIAX—LMM Mar 55 Call 2.90–3.00 (10x10)

The icMBBO is 3.10 debit bid at 3.50 credit offer

The dcMBBO is 3.10 debit bid at 3.50 credit offer

The RIP Percentage is 60% of the bid/ask spread or 0.24

Regardless of the fact that the order's limit price does not meet or exceed the RIP requirement (3.10+0.24=3.34) to initiate an Auction upon reevaluation, an RFR is broadcast to all subscribers showing price, the quantity of matched complex quotes and/or orders at that price, imbalance quantity, and side is sent and a 500 millisecond Response Time Interval is started.

The System starts the Auction at the Initiating Priority Customer's limit price bidding 3.30 to buy 90 contracts. The following responses are received:

- @ 50 milliseconds BD1 response, cAOC Order @ 3.25 credit sell of 100 arrives
- @ 150 milliseconds MM1 response, cAOC eQuote @ 3.30 credit sell of 100 arrives

The Complex Auction process will continue until the Response Time Interval ends. When the 500 millisecond Response Time Interval ends, the maximum quantity of 90 contracts will trade at 3.25[sic]

If all interest at the dcMBBO has been exhausted and Auction orders with a managed or limit price that locks or crosses the exhausted dcMBBO price remain, the System will place any remaining Complex Auction interest on the Strategy Book and manage the interest that is eligible to rest on the Strategy Book pursuant to proposed Rule 518(c)(4) to the exhausted dcMBBO price, cancel Complex Auction interest (including remaining complex order cAOC interest) that is not eligible to rest on the Strategy Book, and cancel any complex Standard quotes that are locking or crossing the exhausted dcMBBO price. The System will then immediately initiate a reevaluation of the remaining interest from the Complex Auction and may initiate a new Complex Auction without regard to the RIP.

The System will place any eligible remaining non-marketable Complex Auction orders and quotes on the Strategy Book, cancel any remaining Complex Auction interest that is not eligible to rest on the Strategy Book, and cancel complex Standard quotes that would otherwise require management because of their price as described in proposed Rule 518(c)(4) above if placed on the Strategy Book.

Trade Allocation Following the Complex Auction

Proposed Rule 518(d)(7) describes the allocation of complex orders and quotes that are executed in a Complex Auction. Once the Complex Auction is complete (at the end of the Response Time Interval), such orders and quotes will be allocated first in price priority based on their original limit price, and thereafter as stated herein.

Individual orders and quotes in the leg markets resting on the Simple Order Book prior to the initiation of a Complex Auction and that have remained unchanged during the Auction have first priority, provided the complex order can be executed in full (or in a permissible ratio) against orders and quotes on the Simple Order Book, provided that the prices of the components on the Simple Order Book are at or within the NBBO for each component. Orders and/or quotes resting on the Simple Order Book that execute against a complex order will be allocated pursuant to Rule 514(c). The Exchange believes that unchanged orders and quotes resting on the Simple Order Book should retain their established priority when Legging against a complex order.

Priority Customer complex orders resting on the Strategy Book before, or that are received during, the Response Time Interval, and Priority Customer RFR Responses, collectively have second priority and will be allocated in price-time priority. This is consistent with the handling of Priority Customers on other exchanges[68] and on the MIAX Simple Order Book[69]

Market Maker Priority Interest for Complex and RFR Responses from Market Makers with Priority Interest for Complex collectively have third priority and will be allocated on a pro-rata basis as defined in Rule 514(c)(2).

Market Maker non-Priority Interest for Complex and RFR Responses from Market Makers with non-Priority Interest for Complex collectively have fourth priority and will be allocated on a pro-rata basis as defined in Rule 514(c)(2).

Non-Market Maker Professional Interest complex orders resting on the Strategy Book, non-Market Maker Professional Interest complex orders placed on the Strategy Book during the Response Time Interval, and non-Market Maker Professional Interest RFR Responses will collectively have fifth priority and will be allocated on a pro-rata basis as defined in Rule 514(c)(2).

Finally, individual orders and quotes in the leg markets that are received or changed during the Complex Auction will collectively have sixth priority and will be allocated pursuant to Rule 514(c)(2).[70]

The following examples illustrate the manner in which complex orders and quotes are allocated at the conclusion of the Complex Auction.[71]

Example—*Priority Customer has priority over other responding participants*

MIAX—LMM Mar 50 Call 6.00–6.50 (10x10)
MIAX—LMM Mar 55 Call 3.00–3.30 (10x10)

The Exchange receives an Initiating Customer buy complex order to purchase 1 Mar 50 call and Sell 1 Mar 55 call for a 3.20 debit, 1000 times. The cAOA instruction is present on this order, so the order will initiate a Complex Auction upon arrival if it equals or improves the URIP.

The icMBBO is 2.70 debit bid at 3.50 credit offer
The dcMBBO is 2.70 debit bid at 3.50 credit offer
The URIP Percentage is 60% of the bid/ask spread or 0.48

Since the initiating order price exceeds the URIP requirement (2.70+0.48=3.18) to initiate an auction upon arrival, an RFR is broadcast to all subscribers showing price, the quantity of matched complex quotes and/or orders at that price, imbalance quantity, and side is sent and a 500 millisecond Response Time Interval is started.

The System starts the auction at the Initiating Priority Customer price bidding 3.20 to buy 1000 contracts. The following responses are received:

- @ 50 milliseconds MM1 response, cAOC eQuote @ 3.10 credit sell of 2000 arrives
- @ 150 milliseconds MM4 response, cAOC eQuote @ 3.00 credit sell of 500 arrives
- @ 200 milliseconds MM3 response, cAOC eQuote @ 3.20 credit sell of 500 arrives
- @ 250 milliseconds Priority Customer response, cAOC Order @ 3.10 credit sell of 250 arrives
- @ 500 milliseconds the Response Time Interval ends, the Complex Auction ends and the trade is allocated against the initiating Priority Customer using the single best price at which the greatest quantity can trade in the following manner:

1. 500 trade vs. MM4 @ 3.10 (MM4 achieved price priority by offering at 3.00)
2. 250 trade vs. the Priority Customer response @ 3.10 (The Priority Customer has priority over the MM1 offering at the same price)
3. 250 trade vs. MM1 @ 3.10

Example—*Market Maker with priority quotes has priority over Market Makers without priority quotes*

MIAX—LMM Mar 50 Call 6.00–6.50 (10x10)
MIAX—LMM Mar 55 Call 3.00–3.30 (10x10)

The Exchange receives an Initiating Customer buy complex order to purchase 1 Mar 50 call and Sell 1 Mar 55 call for a 3.20 debit, 1000 times. The cAOA instruction is present on this order, so the order will initiate an auction upon arrival if it equals or improves the URIP.

The icMBBO is 2.70 debit bid at 3.50 credit offer
The dcMBBO is 2.70 debit bid at 3.50 credit offer
The URIP Percentage is 60% of the bid/ask spread or 0.48

Since the order price exceeds the URIP requirement (2.70+0.48=3.18) to initiate an auction upon arrival, an RFR is broadcast to all subscribers showing price, the quantity of matched complex quotes and/or orders at that price, imbalance quantity, and side is sent and a 500 millisecond Response Time Interval is started.

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[68] Similarly, on PHLX, after attempting to trade with the PHLX simple limit order book for the individual components, customer marketable Complex Orders on the PHLX CBOOK (their equivalent of the Strategy Book) have priority over non-public customer Complex Orders. *See* PHLX Rule 1098(e)(vi). CBOE also affords priority to public customer complex orders after attempting to trade the complex order against the individual components, followed by non-public customer orders resting in the CBOE Complex Order Book. *See* CBOE Rule 6.53C(d)(v). This is slightly distinguished from the MIAX System which seeks first to match complex orders resting on the Strategy Book.

[69] When the Priority Customer Overlay is in effect, the highest bid and lowest offer shall have priority except that Priority Customer Orders shall have priority over Professional Interest and all Market Maker interest at the same price. If there are two or more Priority Customer Orders for the same options series at the same price, priority shall be afforded to such Priority Customer Orders in the sequence in which they are received by the System. *See* Exchange Rule 514(d)(1). Other exchanges have similar allocation models for the simple market. For example, ISE Priority Customer Orders have priority over Professional Orders and market maker quotes at the same price in the same options series. *See* ISE Rule 713(c). Similarly, on CBOE, Public customer orders in the electronic book have priority. *See* CBOE Rule 6.45A(a)(i)(A)(1). PHLX allocates contracts to non-public customers only after public customer market and marketable limit orders have been executed. *See* PHLX Rule 1014(g)(vii).

[70] This differs slightly from the execution of orders on other exchanges. ISE may designate on a class basis whether bids and offers at the same price on the complex order book will be executed either in time priority; pursuant to ISE Rule 713(e) regarding priority in the ISE simple order book, or pro-rata based on size. *See* ISE Rule 722(b)(3)(i). Additionally, CBOE establishes priority for the Complex Order Book based upon the rules of trading priority otherwise applicable to incoming electronic orders in the individual component legs or another electronic matching algorithm in the CBOE rules. *See* CBOE Rule 6.53C(c)(ii)(2).

[71] The Exchange notes that in all examples in the filing, a Market Maker response should be considered from a Market Maker that does not have a priority quote, unless the example specifically states that the response is from a Market Maker with a priority quote.

The System starts the auction at the Initiating Priority Customer price bidding 3.20 to buy 1000 contracts. The following responses are received:

- @ 50 milliseconds MM1 non-priority response, cAOC eQuote @ 3.10 credit sell of 2000 arrives
- @ 150 milliseconds MM4 non-priority response, cAOC eQuote @ 3.00 credit sell of 500 arrives
- @ 200 milliseconds MM3 non-priority response, cAOC eQuote @ 3.20 credit sell of 500 arrives
- @ 250 milliseconds MM5 with priority quotes response, cAOC eQuote @ 3.10 credit sell of 500 arrives
- @ 500 milliseconds the Response Time Interval ends, the Complex Auction ends and the trade is allocated against the initiating Priority Customer using the single best price at which the greatest quantity can trade in the following manner:

1. 500 trade vs. MM4 @ 3.10 (MM4 has price priority over the other MMs)
2. 500 trade vs. MM5 @ 3.10 (MM5 has price priority over MM3 and has priority by virtue of priority quoting over MM1)

Example—*Professional Interest starts Auction, joined by Priority Customer Interest to show Priority Customer allocation priority*

MIAX—LMM Mar 50 Call 6.00–6.50 (10x10)
MIAX—LMM Mar 55 Call 3.00–3.30 (10x10)

The Exchange receives an initiating broker-dealer complex order to buy 1 Mar 50 call and Sell 1 Mar 55 call for a 3.20 debit, 1000 times. The cAOA instruction is present on this order, so the order will initiate an auction upon arrival if it equals or improves the URIP.

The icMBBO is 2.70 debit bid at 3.50 credit offer
The dcMBBO is 2.70 debit bid at 3.50 credit offer
The URIP Percentage is 60% of the bid/ask spread or 0.48

Since the order price exceeds the URIP requirement (2.70+0.48=3.18) to initiate an auction upon arrival, an RFR is broadcast to all subscribers showing the price, quantity of matched complex quotes and/or orders at that price, imbalance quantity, and side is sent and a 500 millisecond Response Time Interval begins.

The System starts the auction at the initiating broker dealer price bidding 3.20 to buy 1000 contracts. The following responses are received:

- @ 50 milliseconds Priority Customer #1 unrelated order buy 750 @ 3.20 debit arrives
- @ 150 milliseconds Priority Customer #2 unrelated order buy 500 @ 3.20 debit arrives
- @ 200 milliseconds MM3 response, cAOC eQuote @ 3.20 credit sell of 500 arrives
- @ 250 milliseconds Priority Customer #3 response, cAOC Order @ 3.20 credit sell of 500 arrives
- @ 500 milliseconds the Response Time Interval ends, the auction ends and the trade (including unrelated interest from Priority Customer #s 1 and 2) is allocated against Initiating Customer using the single best price at which the greatest quantity can trade in the following manner:

1. 500 trade Priority Customer #1 buys (Priority Customer #1 has origin type priority over the Broker-Dealer and time priority over Priority Customer #2). Priority Customer #3 sells @ 3.20 (Priority Customer #3 has priority over MM3 offering at the same price).
2. 250 trade Priority Customer #1 buys (Priority Customer #1 has origin type priority over the Broker-Dealer and time priority over Priority Customer #2). MM3 sells @ 3.20 (MM3 is now alone at 3.20 since Priority Customer #3 is filled.
3. 250 trade Priority Customer #2 (which is an unrelated order) buys (Priority Customer #2 has origin type priority over the Broker-Dealer). MM3 sells @ 3.20, and the balance of 250 is placed on the Strategy Book.

Processing of Unrelated Complex Orders

The Complex Auction is designed to work effectively with the Strategy Book and is designed to maintain priority of all resting quotes and orders and any RFR Responses received before the end of the Response Time Interval. Proposed Rule 518(d)(8) describes the manner in which the System handles incoming unrelated complex orders and quotes that are eligible to join a Complex Auction and are received during the Response Time Interval for a Complex Auction-eligible order. Such incoming unrelated complex orders and quotes will simply join the Complex Auction, will be ranked by price, and will be allocated as described above.[72]

The ability for unrelated marketable orders to join and be executed in a Complex Auction enhances the liquidity in the Complex Auction and thus increases opportunities for execution of complex orders and quotes on both sides of the market, all to the benefit of investors and to the marketplace as a whole.

Example—*Arrival of an unrelated marketable complex order on the opposite side.*

MIAX—LMM Mar 50 Call 6.00–6.50 (10x10)
MIAX—LMM Mar 55 Call 3.00–3.30 (10x10)

The Exchange receives an Initiating Customer buy complex order to purchase 1 Mar 50 call and Sell 1 Mar 55 call for a 3.20 debit, 1000 times. The cAOA instruction is present on this order, so the order will initiate an auction upon arrival if it equals or improves the URIP.

The icMBBO is 2.70 debit bid at 3.50 credit offer
The dcMBBO is 2.70 debit bid at 3.50 credit offer
The URIP Percentage is 60% of the bid/ask spread or 0.48

Since the order price exceeds the URIP requirement (2.70+0.48=3.18) to initiate an auction upon arrival, an RFR is broadcast to all subscribers showing the price, quantity of matched complex quotes and/or orders at that price, imbalance quantity, and side is sent and a 500 millisecond Response Time Interval is started.

The System starts the auction at the initiating Priority Customer price bidding 3.20 to buy 1000 contracts. The following responses are received:

- @ 50 milliseconds BD1 response, cAOC Order @ 3.10 credit sell of 1000 arrives
- @ 150 milliseconds MM1 response, cAOC eQuote @ 3.00 credit sell of 500 arrives
- @ 200 milliseconds MM3 response, cAOC eQuote @ 3.20 credit sell of 500 arrives

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[72] The Exchange proposes to include eligible unrelated incoming complex orders and quotes in the Complex Auction Process. This is similar to another exchange. Specifically, PHLX incoming Complex Orders that were received during the COLA Timer (equivalent to the MIAX Response Time Interval) for the same Complex Order Strategy as the COLA-eligible order that are on the same side of the market will join the COLA. *See* PHLX Rule 1098(e)(viii)(B). Incoming PHLX Complex Orders on the opposite side of the market from the COLA-eligible order will join the COLA or be executed after the COLA under various circumstances described in the rule. Other exchanges permit certain orders to join a complex auction under limited circumstances, and other unrelated complex orders will terminate the auction process. For example, on CBOE incoming complex orders that are received prior to the expiration of the Response Time Interval for the original COA that are on the opposite side of the market and are marketable against the starting price of the original COA-eligible order will cause the original COA to end. Incoming COA-eligible orders are on the same side of the market, at the same price or worse than the original COA-eligible order and better than or equal to the starting price will join the original COA. *See* CBOE Rule 6.53C(d)(viii). NYSE MKT distinguishes the processing of unrelated complex orders by side of market. *See* NYSE MKT Rule 980NY(c)[sic](8).

- @ 250 milliseconds MM4 response, cAOC eQuote @ 3.10 credit sell of 250 arrives
- @ 350 milliseconds BD2 submits an unrelated complex order @ 2.70 credit sell of 200 arrives
- @ 500 milliseconds the Response Time Interval ends, the Complex Auction ends and the trade is allocated against the initiating Priority Customer using the single best price at which the greatest quantity can trade in the following manner:

1. 200 trade vs. unrelated complex order @ 3.10 (BD2 achieved price priority by offering at 2.70)
2. 500 trade vs. MM1 @ 3.10 (MM1 achieved price priority by over the other responses by offering at 3.00)
3. 250 trade vs. MM4 @ 3.10 (MM4 achieved price priority over MM3 by offering at 3.10 and origin type priority over BD1)
4. 50 trade vs. BD1 @ 3.10 (BD1 achieved price priority over MM3 by offering at 3.10)

Example—*Arrival of unrelated marketable complex order on the same side*

MIAX—LMM Mar 50 Call 6.00–6.50 (10x10)
MIAX—LMM Mar 55 Call 3.00–3.30 (10x10)

The Exchange receives an Initiating Priority Customer buy complex order to purchase 1 Mar 50 call and Sell 1 Mar 55 call for a 3.20 debit, 1000 times. The cAOA instruction is present on this order, so the order will initiate an auction upon arrival if it equals or improves the URIP.

The icMBBO is 2.70 debit bid at 3.50 credit offer

The dcMBBO is 2.70 debit bid at 3.50 credit offer

The URIP Percentage is 60% of the bid/ask spread or 0.48

Since the order price exceeds the URIP requirement (2.70+0.48=3.18) to initiate an auction upon arrival, an RFR is broadcast to all subscribers showing the price, quantity of matched complex quotes and/or orders at the Exchange's disseminated price, imbalance quantity, and side is sent and a 500 millisecond Response Time Interval is started.

The System starts the auction at the Initiating Priority Customer price bidding 3.20 to buy 1000 contracts. The following responses are received:

- @ 50 milliseconds BD1 response, cAOC Order @ 3.10 credit sell of 1000 arrives
- @ 150 milliseconds MM1 response, cAOC eQuote @ 3.00 credit sell of 500 arrives
- @ 200 milliseconds MM3 response, cAOC eQuote @ 3.20 credit sell of 500 arrives
- @ 250 milliseconds MM4 response, cAOC eQuote @ 3.10 credit sell of 250 arrives
- @ 350 milliseconds BD2 submits an unrelated complex order @ 3.20 debit buy of 200 arrives
- @ 500 milliseconds the Response Time Interval ends, the Complex Auction ends and the trade is allocated against the initiating Broker-Dealer using the single best price at which the greatest quantity can trade in the following manner:

1. Initiating Priority Customer buys 500 vs. MM1 @ 3.10 (The Priority Customer initiating order has origin type priority over BD2. MM1 achieved price priority over other responses by offering at 3.00)
2. Initiating Priority Customer buys 250 vs. MM4 @ 3.10 (The Priority Customer initiating order has origin type priority over BD2. MM4 achieved price priority over MM3 by offering at 3.10 and origin type priority over BD1)
3. Initiating Priority Customer buys 250 vs. BD1 @ 3.10 (The Priority Customer initiating order has origin type priority over BD2. BD1 achieved price priority over MM3)
4. BD2 buys 200 vs BD1 @ 3.10 (The Priority Customer initiating order is filled. BD1 achieved price priority over MM3)

Proposed Rule 518(d)(9) states that a complex order not designated as cAOA will either be (i) executed in full at a single price or at multiple prices up to its limit price, with remaining contracts placed on the Strategy Book; (ii) executed until the order exhausts the opposite side dcMBBO, at which time the order will be placed on the Strategy Book and evaluated for Complex Auction eligibility; or (iii) cancelled.

Proposed Rules 518(d)(10), (11) and (12) each describe the effect(s) of certain market conditions on the Complex Auction. Proposed Rule 518[sic](10) provides that a change in the best bid or offer of the leg markets will not affect the processing of the Complex Auction. Any such changed bid or offer will be included in the evaluation at the end of the Response Time Interval.

Proposed Rule 518(d)(11) states that if the underlying security of a Complex Auction-eligible order that is a market order enters a Limit State or Straddle State, as defined in Rule 530 the Complex Auction will end upon such underlying security's entering of the Limit or Straddle State if such market order is the only trading interest remaining on that side of the Complex Auction, in which case the remaining portion of such market order will be cancelled. If there are orders and/or quotes other than such market order on that side of the Complex Auction, such market order will be cancelled and the Complex Auction will continue. Any remaining complex orders and/or quotes that joined the Complex Auction will continue to be processed according to proposed Rule 518(d) as discussed above.

Proposed Rule 518(d)(12), states that if, during a Complex Auction, the underlying security and/or any component of a Complex Auction-eligible order is subject to a wide market condition, a SMAT Event or a trading halt, the Complex Auction will be handled as set forth in proposed Rule 518, Interpretations and Policies .05(e) as described in detail below.

The Exchange believes that the provisions regarding the Complex Auction provide a framework that will enable the efficient trading of complex orders in a manner that is similar to other options exchanges as stated above, and in some ways enhances the processing of unrelated complex orders that join the Complex Auction process seamlessly. Further, this clarity in the operation of the Complex Auction and its consistency with other exchanges will help promote a fair and orderly options market. As described above, the Complex Auction is designed to work in concert with the Strategy Book and with a priority of allocation that will be similar to the allocation of simple orders and quotes on MIAX. If orders are received by the Exchange during the Response Time Interval, such orders will be eligible to participate in the Complex Auction, subject to the process above. If orders received are not executed in the Complex Auction, the time stamps they received will be used to determine time priority for their execution outside of the auction.

Interpretations and Policies

The Exchange also proposes several Interpretations and Policies to proposed Rule 518.

Stock-Option Orders

Proposed Interpretations and Policies .01 Special Provisions Applicable to Stock-Option Orders provides additional detail regarding the trading and regulation of stock-option orders on the Exchange. The Exchange will determine when stock-option orders will be made available for trading in the System and communicate such determination to Members via Regulatory Circular.

As set forth in proposed Rule 518, Interpretations and Policies .01(a), stock-option orders may be executed against other stock-option orders through the Strategy Book and Complex Auction. Stock-option orders will not be legged against the individual component legs, and the System will not generate a derived order based upon a stock-option order. A stock-option order shall not be executed on the System unless the underlying security component is executable at the price(s) necessary to achieve the desired net price.

Members may only submit stock-option orders if such orders comply with the Qualified Contingent Trade Exemption from Rule 611(a) of Regulation NMS [73] under the Act. Members submitting such complex orders represent that such orders comply with the Qualified Contingent Trade Exemption.

To participate in stock-option order processing, a Member must give up a Clearing Member previously identified to, and processed by the Exchange as a Designated Give Up for that Member in accordance with Rule 507 and which has entered into a brokerage agreement with one or more Exchange-designated broker-dealers that are not affiliated with the Exchange to electronically execute the underlying security component of the stock-option order at a stock trading venue selected by the Exchange-designated broker-dealer on behalf of the Member.

Proposed Rule 518, Interpretations and Policies .01(b) sets forth the process by which stock-option orders, including inbound and those resting on the Strategy Book, will be handled. When a stock-option order is received by the Exchange, the System will validate that the stock-option order has been properly marked as required by Rule 200 of Regulation SHO under the Act ("Rule 200").[74] Rule 200 requires all broker-dealers to mark sell orders of equity securities as "long," "short," or "short exempt." Accordingly, Members submitting stock-option orders must mark the underlying security component (including ETF) "long," "short," or "short exempt" in compliance with Rule 200. If the stock-option order is not so marked, the order will be rejected by the System. Likewise, any underlying security component of a stock-option order sent by the Exchange to the Exchange-designated broker-dealer shall be marked "long," "short," or "short exempt" in the same manner in which it was received by the Exchange from the submitting Member.

If the stock-option order is properly marked, the System will determine whether the stock-option order is Complex Auction-eligible. If the stock-option order is Complex Auction-eligible, the System will initiate the Complex Auction Process described in paragraph (d) of this Rule. Any stock-option order executed utilizing the Complex Auction Process will comply with the requirements of Rule 201 of Regulation SHO under the Act ("Rule 201") [75] as discussed further below.

When the short sale price test in Rule 201 is triggered for a covered security,[76] a "trading center," [77] such as the Exchange, an Exchange-designated broker-dealer, or a stock trading venue, as applicable, must comply with Rule 201. Rule 201 requires a trading center to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid [78] if the price of that covered security decreases by 10% or more from the covered security's closing price as determined by the listing market [79] for the covered security as of the end of regular trading hours on the prior day; [80] and impose these requirements for the remainder of the day and the following day when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan.[81] A trading center such as the Exchange, an Exchange-designated broker-dealer and a stock trading venue, as applicable, on which the underlying security component is executed, must also comply with Rule 201(b)(1)(iii)(B),[82] which provides that a trading center must establish, maintain, and enforce written policies and procedures reasonably designed to permit the execution or display of a short sale order of a covered security marked "short exempt" [83] without regard to whether the order is at a price that is less than or equal to the current national best bid.[84]

If the stock-option order is not Complex Auction-eligible, the System will determine if it is eligible to be executed against another inbound stock-option order or another stock-option order resting on the Strategy Book. If eligible, the System will route both sides of the matched underlying security component of the stock-option order as a Qualified Contingent Trade ("QCT") to an Exchange-designated broker-dealer for execution on a stock trading venue. The stock trading venue will then either successfully execute the QCT or cancel it back to the Exchange-designated broker-dealer, which in turn will either report the execution of the QCT or cancel it back to the Exchange. While the Exchange is a trading center pursuant to Rule 201, the Exchange will neither execute nor display the underlying security component of a stock-option order. Instead, the execution or display of the underlying security component of a stock-option order will occur on a trading center other than the Exchange, such as an Exchange-designated broker-dealer or other stock trading venue.

If the Exchange-designated broker-dealer or other stock trading venue, as applicable, cannot execute the underlying security component of a stock-option order in accordance with Rule 201, the Exchange will not execute the option component(s) of the stock-option order and will either place the unexecuted stock-option order on the Strategy Book or cancel it back to the submitting Member in accordance with the submitting Member's instructions (except that cAOC and cIOC stock-option orders and eQuotes will be cancelled). Once placed back onto the Strategy Book, the stock-option order will be handled in accordance with Proposed Rule 518, Interpretations and Policies .01(b) as described herein.

The execution price of the underlying security component must be also within the high-low range for the day in the underlying security at the time the stock-option order is processed and within a certain price from the current market, which the Exchange will establish and communicate to Members via Regulatory Circular. If the underlying security component price is not within these parameters, the stock-option order is not executable.

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[73] 17 CFR 242.611(a).

[74] 17 CFR 242.200.

[75] 17 CFR 242.201.

[76] For purposes of this proposal, the term "covered security" shall have the same meaning as in Rule 201(a)(1) of Regulation SHO. The term "covered security" is defined in Rule 201(a)(1) as any NMS stock as defined in Rule 600(b)(47) of Regulation NMS. *See also* 17 CFR 242.600(b)(47).

[77] Rule 201(a)(9) states that the term "trading center" shall have the same meaning as in Rule 600(b)(78). Rule 600(b)(78) of Regulation NMS defines a "trading center" as "a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent." *See* 17 CFR 242.600(b)(78). The definition encompasses all entities that may execute short sale orders. Thus, Rule 201 will apply to any entity that executes short sale orders.

[78] The term "national best bid" is defined in Rule 201(a)(4). 17 CFR 242.201(a)(4).

[79] The term "listing market" is defined in Rule 201(a)(3). 17 CFR 242.201(a)(3).

[80] 17 CFR 242.201(b)(1)(i).

[81] 17 CFR 242.201(b)(1)(ii).

[82] 17 CFR 242.201(b)(1)(iii)(B).

[83] 17 CFR 242.200(g)(2).

[84] Since the underlying security component of a stock-option order is not displayed by the Exchange, the exception in Rule 201(b)(1)(iii)(A) is not available. 17 CFR 242.201(b)(1)(iii)(A).

If the stock-option order is not Complex Auction-eligible and cannot be executed or placed on the Strategy Book, it will be cancelled by the System. Otherwise, the stock-option order will be placed on the Strategy Book.

As set forth in proposed Rule 518, Interpretations and Policies .01(c) regarding the option component of a stock-option order, the option leg(s) of a stock-option order shall not be executed (i) at a price that is inferior to the Exchange's best bid (offer) in the option or (ii) at the Exchange's best bid (offer) in that option if one or more Priority Customer Orders are resting at the best bid (offer) price on the Simple Order Book in each of the option components and the stock-option order could otherwise be executed in full (or in a permissible ratio). If one or more Priority Customer Orders are resting at the best bid (offer) price on the Simple Order Book, at least one option component must trade at a price that is better than the corresponding bid or offer in the marketplace by at least $0.01. The option leg(s) of a stock-option order may be executed in a $0.01 increment, regardless of the minimum quoting increment applicable to that series.[85]

Proposed Rule 518, Interpretations and Policies .01(d) provides that stock-option orders and quotes on the Strategy Book that are marketable against each other will automatically execute, subject to price and priority provisions described in the above paragraph relating to the option component of the stock-option order. Orders and quotes may be submitted by Members to trade against orders on the Strategy Book.[86]

Proposed Rule 518, Interpretations and Policies .01(e) provides that stock-option orders executed via Complex Auction shall trade in the sequence set forth in proposed Rule 518(d)(5) described above except that the provision regarding individual orders and quotes in the leg markets resting on the Simple Order Book prior to the initiation of a Complex Auction will not be applicable and such execution will be subject to the conditions noted above concerning the price of the option leg(s), together with all applicable securities laws.

Proposed Rule 518, Interpretations and Policies .01(f) provides that the underlying security of a stock-option order is in a limit up-limit down state as defined in Rule 530, such order will only execute if the calculated stock price is within the permissible Price Bands as determined by SIPs[87] under the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS, as it may be amended from time to time (the "LULD Plan").

Market Maker Complex Quotes

Proposed Rule 518, Interpretations and Policies .02 describes the manner in which the Exchange will determine to allow Market Maker quotes in complex strategies.[88] Market Maker complex quotes may be entered as either complex Standard quotes or complex eQuotes, as defined in proposed Rule 518, Interpretations and Policies .02(a).[89]

The Exchange will determine, on a class-by-class basis, the complex strategies in which Market Makers may submit complex Standard quotes, and will notify Members of such determination via Regulatory Circular. Market Makers may submit complex eQuotes in their appointed options classes.

A "Complex Auction or Cancel eQuote" or "cAOC eQuote" is an eQuote submitted by a Market Maker that is used to provide liquidity during a specific Complex Auction with a time in force that corresponds with the duration of the Complex Auction. cAOC eQuotes will not: (i) Be executed against individual orders and quotes resting on the Simple Order Book; (ii) be eligible to initiate a Complex Auction, but may join a Complex Auction in progress; (iii) rest on the Strategy Book; or (iv) be displayed.

A "Complex Immediate or Cancel eQuote" or "cIOC eQuote" is a complex eQuote with a time-in-force of IOC that may be matched with another complex quote or complex order for an execution to occur in whole or in part upon receipt into the System.[90] cIOC eQuotes will not: (i) Be executed against individual orders and quotes resting on the Simple Order Book; (ii) be eligible to initiate a Complex Auction or join a Complex Auction in progress; (iii) rest on the Strategy Book; or (iv) be displayed. Any portion of a cIOC eQuote that is not executed will be immediately cancelled.

Market Maker complex quotes are executed in the same manner as complex orders but will not be executed against bids and offers on the Simple Order Book via Legging as described in proposed Rule 518(c)(2)(iii). Market Maker complex Standard quotes may rest on the Strategy Book and are not subject to the managed interest process described in proposed Rule 518(c)(4). An unexecuted complex Standard quote with a limit price that would otherwise be managed to the icMBBO will be cancelled.

Market Makers are not required to enter complex quotes on the Strategy Book. Quotes for complex strategies are not subject to any quoting requirements that are applicable to Market Maker quotes in the simple market for individual options series or classes. Volume executed in complex strategies is not taken into consideration when determining whether Market Makers are meeting quotation obligations applicable to Market Maker quotes in the simple market for individual options.[91]

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[85] *See also* CBOE Rule 6.53C.06(b), which states that the option leg(s) shall not be executed at a price that is (i) at a price that is inferior to the Exchange's best bid (offer) in the series or (ii) at the Exchange's best bid (offer) in that series if one or more public customer orders are resting at the best bid (offer) price on the Ebook in each of the component option series and the stock-option order could otherwise be executed in full (or in a permissible ratio). The option leg(s) of a stock-option order may be executed in a one-cent increment, regardless of the minimum quoting increment applicable to that series.

[86] *See also* CBOE Rule 6.53C.06(c), which differs slightly, stating that orders and quotes may be submitted by market participants to trade against orders in the COB except that the N second group timer shall not be in effect for stock-option orders. MIAX does not have an "N–second group timer."

[87] *See supra* note 26.

[88] ISE permits market maker complex quotes. *See supra* note 23.

[89] A complex Standard quote is defined as a complex quote submitted by a Market Maker that cancels and replaces the Market Maker's previous complex Standard quote for that side of the strategy, if any. A complex eQuote is defined as a complex quote submitted by a Market Maker with a specific time in force that does not automatically cancel and replace the Market Maker's previous complex Standard quote or complex eQuote.

[90] This is based on the Exchange's current IOC eQuotes in the simple market. *See* Exchange Rule 517(a)(ii)[sic](iv).

[91] *See* Proposed Rule 518, Interpretations and Policies .02. This is substantially similar to complex quoting functionality currently operative on another exchange. Specifically, ISE market makers may enter quotes for complex order strategies on the complex order book in their appointed options classes. Market Maker quotes for complex order strategies are executed in the same manner as orders as provided in other ISE rules but will not be automatically executed against bids and offers on the Exchange for the individual legs. Just as with the proposed MIAX rules, ISE market makers are not required to enter quotes on the complex order book. Quotes for complex orders are not subject to any quotation requirements that are applicable to ISE market maker quotes in the regular market for individual options series or classes, nor is any volume executed in complex orders taken into consideration when determining whether ISE market makers are meeting quotation obligations applicable to market maker quotes in the regular market for individual options series. *See* ISE Rule 722, Commentary [sic] .03.

Improvement Percentages

Proposed Rule 518, Interpretations and Policies .03 establishes the method by which the Exchange will determine whether complex order interest is qualified to initiate a Complex Auction. Such qualification is contingent on three categories of "improvement percentages" that are used to determine the complex order's marketability at the time of the System's evaluation.[92]

For complex orders received prior to the opening of all individual components of a complex strategy, the System will calculate an IIP value, which is a defined percentage of the current dcMBBO bid/ask differential once all of the components of the complex strategy have opened. Such percentage will be defined by the Exchange and communicated to Members via Regulatory Circular. If a Complex Auction-eligible order is priced equal to or improves the IIP value and is also priced equal to, or improves, other complex orders and/or quotes resting at the top of the Strategy Book, the complex order will be eligible to initiate a Complex Auction.

Example—*Initial Improvement Percentage (IIP)*

Option quotes immediately after entering free trading are as follows
MIAX—LMM quote Mar 50 Call 6.00–6.50 (10x10)
MIAX—LMM quote Mar 55 Call 2.00–2.30 (10x10)
The strategy is buy 1 Mar 50 calls and sell 2 Mar 55 calls
The dcMBBO is 1.40 debit bid at 2.50 credit offer
The IIP has been set by the Exchange at 60%
The bid/ask spread is 1.10 wide (2.50 − 1.40 = 1.10)
The IIP value is 1.10 * 60% = 0.66

Buy orders received before the strategy components are all open must be bid at a level that equals or crosses a 2.06 (1.40+0.66) debit in order to initiate a Complex Auction when the components enter free trading.

Sell orders received before the strategy components are all open must be offered at a level that equals or crosses a 1.84 (2.50–0.66) credit in order to initiate a Complex Auction when the components enter free trading.

Upon receipt of a complex order when the complex strategy is open, the System will calculate an Upon Receipt Improvement Percentage ("URIP") value, which is a defined percentage of the current dcMBBO bid/ask differential. Such percentage will be defined by the Exchange and communicated to Members via Regulatory Circular. If a Complex Auction-eligible order is priced equal to or improves the URIP value and is also priced to improve other complex orders and/or quotes resting at the top of the Strategy Book, the complex order will be eligible to initiate a Complex Auction.

Example—*Upon Receipt Improvement Percentage (URIP)*

Option quotes upon arrival of a cAOA designated complex order
MIAX—LMM quote Mar 50 Call 6.00–6.50 (10x10)
MIAX—LMM quote Mar 55 Call 2.00–2.30 (10x10)
The strategy is buy 1 Mar 50 call and sell 2 Mar 55 calls
The dcMBBO is 1.40 debit bid at 2.50 credit offer
The URIP has been set by the Exchange at 60%
The bid/ask spread is 1.10 wide (2.50 − 1.40 = 1.10)
The URIP value is 1.10 * 60% = 0.66

Buy orders designated as cAOA must be bid at a level that equals or crosses a 2.06 (1.40+0.66) debit in order to initiate a Complex Auction upon receipt.

Sell orders designated as cAOA must be offered at a level that equals or crosses a 1.84 (2.50–0.66) credit in order to initiate an Auction upon receipt.

Upon evaluation of a complex order resting at the top of the Strategy Book, the System will calculate a Re-Evaluation Improvement Percentage ("RIP") value, which is a defined percentage of the current dcMBBO bid/ask differential. Such percentage will be defined by the Exchange and communicated to Members via Regulatory Circular. If a complex order resting at the top of the Strategy Book is priced equal to, or improves, the RIP value, the complex order will be eligible to initiate a Complex Auction.

Example—*Re-Evaluation Improvement Percentage (RIP)*

Option quotes upon re-evaluation
MIAX—LMM Mar 50 Call 6.00–6.50 (10x10)
MIAX—LMM Mar 55 Call 2.00–2.30 (10x10)
The strategy is Buy 1 Mar 50 call and Sell 2 Mar 55 calls
The dcMBBO is 1.40 debit bid at 2.50 credit offer
The RIP has been set by the Exchange at 70%
The bid/ask spread is 1.10 wide (2.50 − 1.40 = 1.10)
The RIP value is 1.10 * 70% = 0.77

Buy orders must be bid at a level that equals or crosses a 2.17 (1.40+0.77) debit in order to initiate a Complex Auction upon re-evaluation.

Sell orders must be offered at a level that equals or crosses a 1.73 (2.50–0.77) credit in order to initiate a Complex Auction upon re-evaluation.

Proposed Rule 518, Interpretations and Policies .04 is a regulatory provision that prohibits the dissemination of information related to Complex Auction-eligible orders by the submitting Member to third parties. Such conduct will be deemed conduct inconsistent with just and equitable principles of trade as described in Exchange Rule 301.

Price and Other Protections

Proposed Interpretations and Policies .05 establishes Price Protection standards that are intended to ensure that certain types of complex strategies will not be executed outside of a preset standard minimum and/or maximum price limit.

First, the proposal establishes a price protection program for Vertical Spreads and Calendar Spreads by establishing a Vertical Spread Variance ("VSV") and Calendar Spread Variance ("CSV"). VSV will apply only to Vertical Spreads, and CSV will apply only to Calendar Spreads.[93]

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[92] This is similar to the manner in which other exchanges determine a complex order's eligibility to initiate an auction for complex orders. CBOE rules state that a "COA-eligible order" means a complex order that, as determined by the Exchange on a class-by-class basis, is eligible for a COA considering the order's marketability (defined as a number of ticks away from the current market). *See* CBOE Rule 6.53C(d)[sic](2). Respecting complex orders resting on the CBOE Complex Order Book ("COB"), for each class where COA is activated, CBOE may also determine to activate COA for complex orders resting in COB. For such classes, any non-marketable order resting at the top of the COB may be automatically subject to COA if the order is within a number of ticks away from the current derived net market. *See* CBOE Rule 6.53C, Interpretations and Policies .04. This differs from proposed Rule 518, Interpretations and Policies .03, which would make such a determination based upon the percentage by which a complex order (a potential Complex Auction-eligible order) improves the market at the time of evaluation.

[93] A "Vertical Spread" is a complex strategy consisting of the purchase of one call (put) option and the sale of another call (put) option overlying the same security that have the same expiration but different strike prices. *See* proposed Rule 518, Interpretations and Policies .05(a). The proposed MIAX VSV and CSV price protections are substantially similar to the price protections that are currently operative on other exchanges. For example, the PHLX Strategy Price Protection ("SPP") is a feature of the System that prevents certain Complex Order Strategies from trading at prices outside of pre-set standard limits. The PHLX SPP for Vertical and Time (Calendar) spreads is virtually the same as the proposed MIAX VSV and CSV price protections, except that the PHLX rule refers to a "Time Spread" instead of a "Calendar Spread." ISE's Vertical and Calendar Spread price protections differ slightly in that the ISE system will (i) prevent the execution of a vertical spread order at a price that is less than zero; (ii) reject a vertical spread order when entered with a net price

Continued

The VSV establishes minimum and maximum trading price limits for Vertical Spreads. The maximum possible trading price limit of the VSV is the difference between the two component strike prices plus a pre-set value. For example, a Vertical Spread consisting of the purchase of one January 30 call and the sale of one January 35 call would have a maximum trading price limit of $5.00 plus a pre-set value. The minimum possible trading price limit of a Vertical Spread is always zero minus a pre-set value. The pre-set value will be uniform for all option classes traded on the Exchange as determined by the Exchange and communicated to Members via Regulatory Circular.

A "Calendar Spread" is a complex strategy consisting of the purchase of one call (put) option and the sale of another call (put) option overlying the same security that have different expirations but the same strike price. The CSV establishes a minimum trading price limit for Calendar Spreads. The CSV establishes a minimum trading price limit for Calendar Spreads. The maximum possible value of a Calendar Spread is unlimited, thus there is no maximum price protection for Calendar Spreads. The minimum possible trading price limit of a Calendar Spread is zero minus a pre-set value. The pre-set value will be uniform for all option classes traded on the Exchange as determined by the Exchange and communicated to Members via Regulatory Circular.

If the execution price of a complex order would be outside of the limits established in the VSV or the CSV, such complex order will be placed on the Strategy Book and will be managed to the appropriate trading price limit as described in proposed Rule 518(c)(4) above. Orders to buy below the minimum trading price limit and orders to sell above the maximum trading price limit (in the case of Vertical Spreads) will be rejected by the System.

Another feature in the System that is designed to protect investors from executions that are outside of the price on any individual market is the Implied Away Best Bid or Offer ("ixABBO") price protection feature. The ixABBO price protection feature is a price protection mechanism under which, when in operation as requested by the submitting Member, a buy order will not be executed at a price that is higher than each other single exchange's best displayed offer for the complex strategy, and under which a sell order will not be executed at a price that is lower than each other single exchange's best displayed bid for the complex strategy. The ixABBO is calculated using the best net bid and offer for a complex strategy using each other exchange's displayed best bid or offer on their simple order book. For stock-option orders, the ixABBO for a complex strategy will be calculated using the BBO for each component on each individual away options market and the NBBO for the stock component. The ixABBO price protection feature must be engaged on an order-by-order basis by the submitting Member and is not available for complex Standard quotes, complex eQuotes, or cAOC orders.

Example—*Complex order with ixABBO Protection Requested*

MIAX—quote Mar 50 Call 6.00–6.50 (10x10)
MIAX—quote Mar 55 Call 2.00–2.30 (10x10)
GEM Mar 50 Call 6.00–6.50 (10x10)
GEM Mar 55 Call 2.00–2.10 (10x10)
BOX Mar 50 Call 6.00–6.50 (10x10)
BOX Mar 55 Call 2.10–2.30 (10x10)

The Exchange receives an Initiating Customer order to buy 1 Mar 50 call and sell 2 Mar 55 calls for a 2.50 debit × 100, with ixABBO protection requested.

The icMBBO is 1.40 debit bid at 2.50 credit offer

The ixABBO is 1.80 debit bid (GEM) at 2.30 credit offer (BOX)

The cAOA instruction is not present on this order, so the order will not initiate an auction upon arrival regardless of its relationship to the Improvement Percentage. The ABBO Price Protection instruction which instructs the Exchange to apply ixABBO protection is present, so the Exchange will protect the order to the best bid for the strategy or best offer for the strategy available from any single exchange's protected quotation in the Simple Order Market, including the MIAX. Since the ixABBO protection has been selected, the inbound order cannot be legged against the Strategy Book for a 2.50 debit (the strategy is offered at 2.30 on BOX). In order to display the order at its maximum tradable price, the inbound order is managed on the Strategy Book and displayed at its protected limit of 2.30 debit bid. While the MIAX icMBBO remains 1.40 debit bid at 2.50 credit offer, the combination of the Simple Order Book and the Strategy Book becomes 2.30 debit bid at 2.50 credit offer.

The BOX then updates their protected Simple Order Market quotation while all other Simple Market quotations remain the same:

BOX Mar 50 Call 6.00–6.50 (10x10)
BOX Mar 55 Call 2.20–2.40 (10x10)
The ixABBO is now 1.80 debit (GEM) at 2.10 credit (BOX)

The MIAX System will now re-evaluate the order and will apply the new ixABBO protection. The order will now be managed on the Strategy Book and displayed at its protected limit of 2.10 debit bid. While the MIAX icMBBO remains 1.40 debit bid at 2.50 credit offer, the combination of the Simple Order Book and the Strategy Book becomes 2.10 debit bid at 2.50 credit offer. The BOX again updates their protected Simple Order Market quotation while all other Simple Market quotations remain the same:

BOX Mar 50 Call 6.00–6.50 (10x10)
BOX Mar 55 Call 2.10–2.30 (10x10)
The ixABBO is now 1.80 debit bid (GEM) at 2.30 credit offer (BOX)

The MIAX System will now re-evaluate the order and will apply the new ixABBO protection. The order will now be managed on the Strategy Book and displayed at its protected limit of 2.30 debit bid. While the MIAX icMBBO remains 1.40 debit bid at 2.50 credit offer, the combination of the Simple Order Book and the Strategy Book once again becomes 2.30 debit bid at 2.50 credit offer.

Wide Market Conditions, SMAT Events and Halts

The Exchange is proposing to establish rules for additional investor protections when external market events occur that affect complex orders and quotes on the Exchange. These external events and additional investor protections, and the manner in which the System responds to them, are defined and specified in proposed Rule 518, Interpretations and Policies .05(e). First, a "wide market condition" is defined as any individual component of a complex strategy having, at the time of evaluation, an MBBO quote width that is wider than the permissible valid quote width as defined in Rule 603(b)(4).[94]

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greater than the value of the higher strike price minus the lower strike price (plus a pre-set value) (iii) prevent the execution of a vertical spread order at a price that is greater than the value of the higher strike price minus the lower strike price (plus a pre-set value) when entered as a market order to buy; (iv) reject a calendar spread order (*i.e.*, an order to buy a call (put) option with a longer expiration and to sell another call (put) option with a shorter expiration in the same security at the same strike price) when entered with a net price of less than zero (minus a pre-set value), and will prevent the execution of a calendar spread order at a price that is less than zero (minus a pre-set value) when entered as a market order to sell. *See* ISE Rule 722, Supplementary Material .07(c).

[94] A Market Maker on the Exchange is expected to price option contracts fairly by, among other things, bidding and offering so as to create differences of no more than $5 between the bid and offer ("bid/ask differentials") following the opening rotation in an equity option contract. The Exchange

may establish differences other than the bid/ask differentials described above for one or more option series or classes. *See* Exchange Rules 603(b)(4)(i) and (ii).

Proposed Rule 518, Interpretations and Policies .05(e)(1)(i), describes how the System functions when there is a wide market condition during free trading (*i.e.,* when there is not a Complex Auction in progress). Specifically, if a wide market condition exists for a component of a complex strategy, trading in the complex strategy will be suspended. The Strategy Book will remain available for Members to enter and manage complex orders and quotes. New Complex Auctions will not be initiated and incoming Complex Auction-eligible orders that could have otherwise caused an auction to begin will be placed on the Strategy Book. Incoming complex orders with a time in force of IOC will be cancelled.

The System will continue to evaluate the Strategy Book. If a wide market condition exists for a component of a complex strategy at the time of evaluation, complex orders or quotes that could have otherwise been executed will not be executed until the wide market condition no longer exists. When the wide market condition no longer exists, the System will again evaluate the Strategy Book and will use the process and criteria respecting the RIP as described in proposed Interpretations and Policies .03(c) to determine whether complex order interest exists to initiate a Complex Auction, or whether to commence trading in the complex strategy without a Complex Auction.

Proposed Rule 518, Interpretations and Policies .05(e)(1)(ii), describes how the System functions when there is a wide market condition during a Complex Auction. If, at the expiration of the Response Time Interval, a wide market condition exists for a component of a complex strategy in the Complex Auction, trading in the complex strategy will be suspended, and any RFR Responses will be cancelled. Remaining Complex Auction-eligible orders will then be placed on the Strategy Book. When the wide market condition no longer exists, the System will evaluate the Strategy Book pursuant to proposed Rule 518(c)(5)(ii), and will use the process and criteria respecting the RIP as described in proposed Interpretations and Policies .03(c) to determine whether complex order interest exists to initiate a Complex Auction, or whether to commence trading in the complex strategy without a Complex Auction.

The purpose of the rule and functionality concerning a wide market condition is to limit the trading of complex orders when one or more of the components of a complex strategy are wider than the defined valid width in the simple market[95] as this has the potential to create unnaturally wide spreads in the complex strategy, which in turn could result in a less than optimal execution price. The Exchange believes that the rule and functionality are essential in protecting customers submitting complex orders from extreme market conditions in the simple market respecting the components of such complex orders.

Proposed Rule 518, Interpretations and Policies .05(e)(2) sets forth the functionality of the System if a Simple Market Auction or Timer ("SMAT") Event (defined above as a PRIME Auction, a Route Timer, or a liquidity refresh pause)[96] exists for a component of a complex strategy.

If a SMAT Event exists during free trading for a component of a complex strategy, trading in the complex strategy will be suspended. The Strategy Book will remain available for Members to enter and manage complex orders and quotes. New Complex Auctions may be initiated for incoming Complex Auction-eligible orders that meet the requirements of the URIP (as described in proposed Rule 518, Interpretations and Policies .03(b) above). Incoming complex orders and quotes that could otherwise be executed during the SMAT Event(s) without entering the Complex Auction process will be placed on the Strategy Book. Incoming complex orders received during a SMAT Event with a time in force of IOC will be cancelled by the System.

The System will continue to evaluate the Strategy Book. When the SMAT Event(s) no longer exist(s), the System will evaluate the Strategy Book, and will use the process and criteria respecting the RIP to determine whether complex order interest exists to initiate a Complex Auction, or whether to commence trading in the complex strategy without a Complex Auction.

Proposed Rule 518, Interpretations and Policies .05(e)(2)(ii) describes what happens when a SMAT Event occurs during a Complex Auction. If, at the end of the Response Time Interval, a component of a complex strategy is in a SMAT Event, trading in the complex strategy will be suspended and all RFR Responses will be cancelled. Remaining Complex Auction-eligible orders will then be placed on the Strategy Book. When the SMAT Event(s) no longer exist(s), the System will evaluate the Strategy Book pursuant to proposed Rule 518(c)(5)(ii), and will use the process and criteria respecting the RIP as described in Interpretations and Policies .03(c) of this Rule to determine whether complex order interest exists to initiate a Complex Auction, or whether to commence trading in the complex strategy without a Complex Auction.

SMAT Events represent temporary interruptions of free trading in one or more components of a complex strategy. The temporary suspension of trading in complex orders during a SMAT event is intended to enhance continuity, trade-through protection, and orderliness in the simple markets and to protect complex order components from being executed at prices that could be better following a SMAT Event or a wide market condition. Once a SMAT Event is concluded or resolved, the System will evaluate the Strategy Book as described above to provide the previously suspended complex orders with more opportunities to be executed.

Halts

Proposed Rule 518, Interpretations and Policies .05(e)(3) describes the System's functionality when there is a halt in trading for the underlying security or a component of a complex order. If a trading halt exists for the underlying security or a component of a complex strategy, trading in the complex strategy will be suspended.

The Strategy Book will remain available for members to enter and manage complex orders and quotes. Incoming complex orders and quotes that could otherwise be executed or initiate a Complex Auction in the absence of a halt will be placed on the Strategy Book. This is similar to functionality that is currently operative on another exchange.[97] Incoming complex orders and quotes with a time in force of IOC will be cancelled.

When trading in the halted component(s) and/or underlying security of the complex order resumes, the System will evaluate the Strategy Book as described in proposed Rule 518(c)(2)(i), and will use the process and criteria respecting the IIP as described in proposed Rule 518, Interpretations and Policies .03(a) to determine whether complex order interest exists to initiate a Complex Auction, or whether to commence trading in the complex strategy without a Complex Auction.

Proposed Interpretations and Policies .05(e)(3)(ii) describes what happens when there is a halt during a Complex Auction. Unlike during a wide market condition or a SMAT Event, where a Complex Auction will end without trading at the end of the Response Time Interval, if during a Complex Auction any component or the underlying security of a Complex Auction-eligible order is halted, the Complex Auction will end early without trading[98] and all RFR Responses will be cancelled. Remaining complex orders will be placed on the Strategy Book if eligible, or cancelled. When trading in the halted component(s) and/or underlying security of the complex order resumes, the System will evaluate the Strategy Book pursuant to proposed Rule 518(c)(2)(i) above, and will use the process and criteria respecting the IIP as described in Interpretations and Policies .03(a) of this Rule to determine whether marketable complex order interest exists to initiate a Complex Auction, or whether to commence trading in the complex strategy without a Complex Auction.

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[95] *Id.*

[96] *See* proposed Rule 518(a)(16).

[97] *See, e.g.,* PHLX Rule 1098(c)(ii)(C), which states that complex orders will not trade on the PHLX system during a trading halt for any options component of the Complex Order.

Another investor protection proposed by the Exchange is described in Interpretations and Policies .06 of proposed Rule 518, the MIAX Order Monitor for Complex Orders (“cMOM”).[99]

cMOM defines a price range outside of which a complex limit order will not be accepted by the System. cMOM is a number defined by the Exchange and communicated to Members via Regulatory Circular. The default price range for cMOM will be greater than or equal to a price through the cNBBO for the complex strategy to be determined by the Exchange and communicated to Members via Regulatory Circular. Such price will not be greater than $2.50. A complex limit order to sell will not be accepted at a price that is lower than the cNBBO bid, and a complex limit order to buy will not be accepted at a price that is higher than the cNBBO offer, by more than cMOM. A complex limit order that is priced through this range will be rejected.

cMOM includes complex order size protections, open complex order protection, and open complex contract protection. Respecting complex order size protections, the System will prevent certain complex orders from executing or being placed on the Strategy Book if the size of the complex order exceeds the complex order size protection designated by the Member. If the maximum size of complex orders is not designated by the Member, the Exchange will set a maximum size of complex orders on behalf of the Member by default. Members may designate the complex order size protection on a firm wide basis. The default maximum size for complex orders will be determined by the Exchange and announced to Members via Regulatory Circular.

Under the open complex order protection, the System will reject any complex orders that exceed the maximum number of open complex orders held in the System on behalf of a particular Member, as designated by the Member. Members may designate the open complex order protection on a firm wide basis. If the maximum number of open complex orders is not designated by the Member, the Exchange will set a maximum number of open complex orders on behalf of the Member by default. The default maximum number of open complex orders will be determined by the Exchange and announced to Members via Regulatory Circular.

Open complex contract protection provides that the System will reject any complex orders that exceed the maximum number of open complex contracts represented by complex orders held in the System on behalf of a particular Member, as designated by the Member. Members may designate the open complex contract protection on a firm wide basis. If the maximum number of open complex contracts is not designated by the Member, the Exchange will set a maximum number of open complex contracts on behalf of the Member by default. The default maximum number of open complex contracts will be determined by the Exchange and announced to Members via Regulatory Circular.

The cMOM protections will be available for complex orders as determined by the Exchange and communicated to Members via Regulatory Circular.

The Exchange is also proposing to amend Exchange Rule 519A to state that complex orders will participate in the Risk Protection Monitor. The Risk Protection Monitor maintains a counting program (“counting program”) for each participating Member that will count the number of orders entered and the number of contracts traded via an order entered by a Member on the Exchange within a specified time period that has been established by the Member, and will reject orders that exceed a Member-designated “Allowable Order Rate” and an “Allowable Contract Execution Rate.”[100]

Obvious and Catastrophic Errors

The Exchange proposes to adopt Rule 521(c)(5) to address the manner in which obvious errors in complex order transactions will be handled in situations where one or more components of a complex order is eligible to be adjusted or nullified pursuant to Exchange Rule 521(c)(4).[101]

Specifically, if a complex order executes against another complex order on the Strategy Book and one or more components of the transaction is deemed eligible to be adjusted or nullified, the entire trade (all components) will be nullified, unless both parties agree to adjust the transaction to a different price within thirty (30) minutes of being notified by the Exchange of the decision to nullify the transaction. Additionally, if a complex order executes against orders or quotes on the Simple Order Book, each component of the complex order will be reviewed and handled independently in accordance with Exchange Rule 521.[102]

The Exchange also proposes a minor change to Exchange Rule 605, Market Maker Orders, to codify in Rule 605(a) that, in addition to the other order types specified in the rule, Market Makers may place complex orders in option classes to which they are appointed respecting cAOC complex orders.

Because of the technology changes associated with this rule proposal, the Exchange will announce the implementation date of the proposal in a Regulatory Circular to be published no later than 90 days after the publication of the approval order in the **Federal Register**. The implementation date will be no later than 90 days following publication of the Regulatory Circular announcing publication of the approval order in the **Federal Register**.

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[98] This is the only circumstance under which a Complex Auction on MIAX would end early. In all other circumstances described in proposed Rule 518 that would disrupt trading during a Complex Auction, the Complex Auction will end after the Response Time Interval without trading.

[99] cMOM is substantially similar to the Exchange's MIAX Order Monitor (“MOM”) protection for the Simple Order Book. *See* Exchange Rule 519.

[100] For a complete description of the Risk Protection Monitor, *see* Securities Exchange Act Release No. 74496 (March 13, 2015), 80 FR 14421 (March 19, 2015) (SR–MIAX–2015–03).

[101] Exchange Rule 521(c)(4) describes the actions to be taken by the Exchange when a transaction resulting from an obvious error (as defined elsewhere in Rule 521) has occurred, depending upon who the parties to the transaction are.

[102] This differs slightly from rules on other exchanges. For example, ISE rules provide that if both parties to a trade that is one component of a complex order execution are parties to all of the trades that together comprise the execution of a complex order at a single net debit or credit, then if one of those component trades can be nullified under ISE rules, all component trades that were part of the same complex order shall be nullified as well. *See* ISE Rule 720, Commentary [sic] .04. PHLX rules also include this provision. *See* PHLX Rule 1092, Commentary .01. This differs slightly from the rules of other exchanges.

2. Statutory Basis

MIAX believes that its proposed rule change is consistent with Section 6(b) of the Act[103] in general, and furthers the objectives of Section 6(b)(5) of the Act[104] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes in particular that its proposal regarding executions of complex orders against the Simple Order Book is consistent with the Act and furthers the objectives of Section 6(b)(5) of the Act[105] because it provides greater liquidity to the marketplace as a whole by fostering the interaction between the components of complex orders on the Strategy Book and the Simple Order Book. This should enhance the opportunity for executions of both complex orders and simple orders.

The Exchange believes the proposed rule change will result in more efficient trading and reduce the risk that complex orders fail to execute for investors by providing additional opportunities to fill complex orders, and that the changes are consistent with the Act. The Exchange believes that increased interaction, where possible, on a continuous and real-time basis of the bids and offers on each component of a complex strategy with the bids and offers on the corresponding complex strategy and vice versa, through derived orders and Legging, will benefit market participants and investors. The proposed rule change will allow complex orders to interact with interest on the MIAX Simple Order Book and, conversely, allow interest on the MIAX Simple Order Book to interact with complex orders in an efficient and orderly manner.

The Exchange also believes the interaction of orders will benefit investors by increasing the opportunity for complex orders to receive execution, while also enhancing execution quality for orders on the MIAX Simple Order Book. Generally, the options industry rules for the execution of complex orders provide that two complex orders may execute against one another if the execution prices of the component legs result in a net price that is better than the best customer limit order available for the individual component legs. This permits an exchange, when executing two complex orders against one another, to execute each component leg on the market's best bid or offer so long as the execution does not trade ahead of customer interest.

The Exchange believes it is reasonable to permit complex orders that are subject of this rule change to leg into the Simple Order Book. The proposed rule concerning Legging will facilitate the execution of more complex orders, and will thus benefit investors and the general public because complex orders will have a greater chance of execution when they are allowed to leg into the simple market and thereby increase the execution rate for these orders, thus providing market participants with an increased opportunity to execute these orders on MIAX. The prohibition against the Legging of complex orders with two option legs where both legs are buying or both legs are selling and both legs are calls or both legs are puts, and on complex orders with three option legs where all legs are buying or all legs are selling regardless of whether the option leg is a call or a put, protects investors and the public interest by ensuring that Market Makers providing liquidity do not trade above their established risk tolerance levels.

The Exchange believes it is reasonable to limit the types of complex orders that are eligible to leg into the Simple Order Book. The Exchange believes that the vast majority of complex orders sent to the Exchange will be unaffected by this proposed rule. Moreover, the Exchange believes that the potential risk of offering legging functionality for complex orders such as those impacted by the proposed rule could limit the amount of liquidity that Market Makers are willing to provide in the Simple Order Book. In particular, Market Makers, without the proposed limitation, are at risk of executing the cumulative size of their quotations across multiple options series without an opportunity to adjust their quotes. Market Makers may be compelled to change their quoting and trading behavior to account for this additional risk by widening their quotes and reducing the size associated with their quotes, which would diminish the Exchange's quality of markets and the quality of the markets in general. The limitations in proposed Rule 518(c)(2)(iii) substantially diminish a potential source of unintended Market Maker risk when certain types of complex orders leg into the Simple Order Book, thereby removing impediments to and perfecting the mechanisms of a free and open market and a national market system and, in general, protecting investors and the public interest by adding confidence and stability in the Exchange's marketplace. This benefit to investors far exceeds the small amount of potential liquidity provided by the few complex orders to which this aspect of the proposal applies.

Additionally, investors will have greater opportunities to manage risk with the new availability of trading in complex orders. The proposed adoption of rules governing complex order auctions will facilitate the execution of complex orders while providing opportunities to access additional liquidity and fostering price improvement. The Exchange believes the proposed rules are appropriate in that complex orders are widely recognized by market participants as invaluable, both as an investment, and a risk management strategy. The proposed rules will provide an efficient mechanism for carrying out these strategies. In addition, the proposed complex order rules promote equal access by providing Members that subscribe to the Exchange's data feeds that include auction notifications with the opportunity to interact with orders in the Complex Auction. In this regard, any Member can subscribe to the options data provided through the Exchange's data feeds that include auction notifications.

The Exchange believes that the general provisions regarding the trading of complex orders provide a clear framework for trading of complex orders in a manner consistent with other options exchanges. This consistency should promote a fair and orderly national options market system. The Exchange believes that the proposed rules will result in efficient trading and reduce the risk for investors that complex orders could fail to execute by providing additional opportunities to fill complex orders.

The proposed execution and priority rules will allow complex orders to interact with interest in the MIAX Simple Order Book and, conversely, interest on the MIAX Simple Order Book to interact with complex orders in an efficient and orderly manner. Consistent with other exchanges and with well-established principles of customer protection, the proposed rules state that a complex order may be executed at a net credit or debit price with one other Member without giving priority to bids or offers established in the marketplace that are no better than the bids or offers comprising such net credit or debit; provided, however, that if any of the bids or offers established in the marketplace consist of a Priority Customer Order, at least one leg of the complex order must trade at a price that is better than the corresponding bid or offer in the marketplace by at least a $0.01 increment.[106] Additionally, before executing against another complex order, a complex order on MIAX will execute first against orders on the MIAX Simple Order Book (except in the limited circumstance described in proposed Rule 518(c)(2)(iii)) if the net price of such orders is equal to the best price on the Strategy Book if any of the bids or offers established in the simple marketplace consist of a Priority Customer Order.

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[103] 15 U.S.C. 78f(b).

[104] 15 U.S.C. 78f(b)(5).

[105] *Id.*

For the reasons set forth above, the Exchange believes the proposed rule change regarding complex order execution is consistent with the goals of the Act to remove impediments to and to perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest.

Market Maker Priority Interest for Complex

The Exchange believes that affording priority in the Strategy Book to Market Makers with complex Standard quotes that are priced at or inside the dcMBBO further perfects the mechanisms of a free and open market and a national market system and, in general, protects investors and the public interest, by providing Market Makers with additional incentive to submit complex Standard quotes at the best price in the Strategy Book.

Certain Market Maker complex Standard quotes and complex eQuotes will qualify as "Market Maker Priority Interest for Complex" on the Strategy Book at the beginning of a Complex Auction, or at the time of execution in free trading. Affording priority in the Strategy Book to Market Makers with a Complex priority quote should provide incentive to MIAX participants to submit complex quotes at the best prices.

Moreover, the Exchange believes that this treatment of Market Makers is a suitable reward for Market Makers quoting in the Strategy Book at the best price in the complex strategy. The Exchange believes this furthers the objectives of Section 6(b)(5) of the Act[107] because it provides greater depth and liquidity in the Strategy Book, all to the benefit of investors. The Exchange believes its proposal to afford priority in the Strategy Book to certain Market Maker quotes on the Strategy Book will result in enhanced liquidity on the Exchange, and thus further perfects the mechanisms of a free and open market and a national market system, consistent with the Act.

Derived Orders

The Exchange believes the generation of derived orders as set forth in proposed Rule 518(a)(9) is consistent with the goals of the Act to remove the impediments to and perfect the mechanism of a free and open market because their addition to the marketplace should facilitate additional transactions and interaction between orders on the Strategy Book and orders on the Simple Order Book. The Exchange believes the addition of derived orders to the MIAX market will benefit Market Makers, traders, and retail investors trading on MIAX by enhancing execution quality and the likelihood and efficiency of trade execution. In the absence of the proposed rule, complex orders that could otherwise execute against interest on the Simple Order Book would not trade.

A derived order is automatically removed from the Simple Order Book if the displayed price of the derived order is no longer at the displayed best bid or offer on the Simple Order Book; if execution of the derived order would no longer achieve the net price of the complex order on the Strategy Book when the other component of the complex order is executed against the best bid or offer on the Simple Order Book; if the complex order is executed in full; if the complex order is cancelled, or if any component of the complex order resting on the Strategy Book that is used to generate the derived order is subject to a SMAT Event, a wide market condition, or a halt. Until such removal, derived orders provide additional likelihood and efficiency of trade execution in furtherance of the goals of the Act. Applying these limitations, the Exchange will closely monitor the generation of derived orders to ensure they do not negatively impact system capacity and performance, thus removing these potential impediments to, and perfecting the mechanism of, a free and open market.

The Exchange further believes that the automatic generation of derived orders will provide additional execution opportunities for complex orders and interest on the MIAX Simple Order Book, and thus enhance execution quality for investors on MIAX. The Exchange believes the additional opportunities for potential execution through the interaction of orders on the Strategy Book and orders on the Simple Order Book as achieved through derived orders, and the potential for enhanced execution quality, as outlined above, promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market, are in the public interest and, therefore, consistent with the Act.

The Exchange believes that the availability of derived orders will provide additional execution opportunities for complex orders without negatively impacting any investors in the simple market. The availability of derived orders may enhance the quality of execution for investors on the MIAX Simple Order Book by improving the price and/or size of the MBBO and by providing additional execution opportunity for resting interest on the MIAX Simple Order Book. The Exchange also believes that derived orders are compliant with Rule 602 of Regulation NMS[108] because each derived order is included in the MBBO if it is equal to or better than the otherwise existing MBBO.

Types of Complex Orders

The Exchange proposes that complex orders may be submitted as limit orders, market orders, IOC orders, GTC orders, or day limit orders as each such term is defined in Exchange Rule 516, or as a cAOA order, or cAOC order.[109] In particular, the Exchange believes that limit orders, IOC orders, GTC orders and day limit orders all provide valuable limitations on execution price and time that help to protect MIAX participants and investors in both the Simple Order Book and in the proposed Strategy Book. The Exchange believes that permitting complex orders to be entered with these varying order contingency types will give MIAX participants greater control and flexibility over the manner and circumstances in which their orders may be executed, modified, or cancelled, and thus will provide for the protection of investors and contribute to market efficiency.

Evaluation

The Exchange believes that the regular and event-driven evaluation of the Strategy Book for the eligibility of complex orders or, as appropriate, complex quotes, to initiate or participate in a Complex Auction, and to determine their eligibility to participate in the managed interest process, whether a derived order should be generated or cancelled, if they are eligible for full or partial execution against a complex order or quote resting on the Strategy Book or through Legging with the Simple Order Book, whether the complex order or quote should be cancelled; and whether the complex order or quote or any remaining portion thereof should be placed on the Strategy Book are consistent with the principles of the Act to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

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[106] *See* proposed Rule 518(c)(3)(i).

[107] 15 U.S.C. 78f(b)(5).

[108] 17 CFR 242.602.

[109] *See* proposed Rule 518(b).

Evaluation of the executability of complex orders and quotes and for the determination as to whether a complex order is Complex Auction-eligible is central to the removal of impediments to, and the perfection of, the mechanisms of a free and open market and a national market system and, in general, the protection of investors and the public interest. The evaluation process ensures that the System will capture and act upon complex orders and quotes that are due for execution or placed in a Complex Auction. The regular and event-driven evaluation process removes potential impediments to the mechanisms of the free and open market and the national market system by ensuring that complex orders and quotes are given the best possible chance at execution at the best price, evaluating the availability of complex orders and quotes to be handled in a number of ways as described in this proposal. Any potential impediments to the order handling and execution process respecting complex orders and quotes are substantially removed due to their continual and event-driven evaluation for subsequent action to be taken by the System. This protects investors and the public interest by ensuring that complex orders and quotes in the System are continually monitored and evaluated for potential action(s) to be taken on behalf of investors that submit their complex orders and quotes to MIAX.

Complex Auction Process

The Complex Auction process is also designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

Following evaluation, a Complex Auction-eligible order may begin a Complex Auction or may join a Complex Auction in progress.[110] The Complex Auction process promotes just and equitable principles of trade, fosters cooperation and coordination with persons engaged in facilitating transactions in securities, removes impediments to and perfects the mechanisms of a free and open market and a national market system and, in general, protects investors and the public interest by ensuring that eligible complex orders and quotes are given every opportunity to be executed at the best prices against an increased level of contra-side liquidity responding to the RFR message. This mechanism of a free and open market is designed to enhance liquidity and the potential for better execution prices during the Response Time Interval, all to the benefit of investors on MIAX, and thereby consistent with the Act.

The Exchange believes that the determination to initiate a Complex Auction using the IIP, URIP or RIP value, as applicable, removes impediments to, and perfects the mechanisms of, a free and open market and a national market system and, in general, protects investors and the public interest, by ensuring that a Complex Auction is conducted for a complex order only when there is a reasonable and realistic chance for price improvement through a Complex Auction. The IIP, URIP and RIP are used to calculate a percentage of the dcMBBO bid/ask differential at or within which the System will determine to initiate a Complex Auction. If a complex order is priced equal to, or improves, the IIP, URIP or RIP value, the complex order will be eligible to initiate a Complex Auction.

The purpose of this provision is to ensure that a complex order will not initiate a Complex Auction if it is priced through the bid or offer at a point (*i.e.,* outside of the IIP, URIP or RIP) where it is not reasonable to anticipate that it would generate a meaningful number of RFR Responses such that there would be price improvement of the complex order's limit price. Promoting the orderly initiation of a Complex Auction is essential to maintaining a fair and orderly market for complex orders; otherwise, the initiation of Complex Auctions that are unlikely to result in price improvement might result in unnecessary activity in the marketplace when there is no meaningful opportunity for price improvement. The Exchange believes that the IIP, URIP and RIP remove this potential impediment to the MIAX market and to the marketplace as a whole.

If a complex order is not priced equal to, or better than, the IIP, URIP or RIP value, the Exchange believes that it is not reasonable to anticipate that it would generate a meaningful number of RFR Responses such that there would be price improvement of the complex order's limit price. Promoting the orderly initiation of Complex Auctions is essential to maintaining a fair and orderly market for complex orders; otherwise, the initiation of Complex Auctions that are unlikely to result in price improvement could affect the orderliness of the marketplace in general.

The Exchange believes that this removes impediments to and perfects the mechanisms of a free and open market and a national market system by promoting the orderly initiation of Complex Auctions, and by limiting the likelihood of unnecessary Complex Auctions that are not expected to result in price improvement.

The Exchange believes the proposed maximum 500 millisecond Response Time Interval promotes just and equitable principles of trade and removes impediments to a free and open market because it allows sufficient time for Members participating in a Complex Auction to submit RFR Responses and would encourage competition among participants, thereby enhancing the potential for price improvement for complex orders in the Complex Auction to the benefit of investors and public interest. The Exchange believes the proposed rule change is not unfairly discriminatory because it establishes a Response Time Interval applicable to all MIAX participants participating in a Complex Auction.

The proposed Complex Auction process is designed to protect the integrity of the System and of the MIAX marketplace for the protection of investors and the public interest by, among other things, limiting the number of Complex Auctions that may be initiated within a given time period. Multiple Complex Auctions may be in progress at any particular time across multiple strategies, but only one Complex Auction per strategy may be in progress at any particular time. Without such a limitation, investors could be faced with an unusually large number of simultaneous Complex Auctions in the same strategy, which in turn could impact the orderly function of the markets. The Exchange believes that this limitation is consistent with the Act because it is designed to remove impediments to and perfect the mechanisms of a free and open market and a national market system by ensuring orderliness in the Complex Auction process.

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[110] A cAOC eQuote will not initiate a Complex Auction but may join a Complex Auction in progress; an IOC eQuote will not initiate or join a Complex Auction in progress. *See* proposed Rule 518, Interpretations and Policies .02(c)(1) and (2).

The Complex Auction Process also protects investors and the public interest by creating more opportunities for price improvement of complex orders, all to the benefit of MIAX participants and the marketplace as a whole.

Complex Order Price Protections

The Exchange believes that the proposed complex order price protections will provide market participants with valuable price and order size protections in order to enable them to better manage their risk exposure when trading complex orders. The VSV will ensure that a Vertical Spread will not trade at a net price of less than the minimum possible value minus a pre-set price setting an acceptable range or greater than the maximum possible value plus a pre-set price setting an acceptable range. The CSV will ensure that a Calendar Spread will not trade at a price of less than zero (minus a pre-set price setting an acceptable range). Orders to buy below the minimum price and orders to sell above the maximum price will be rejected by the System.

cMOM defines a price range outside of which a complex limit order will not be accepted by the System. A complex order that is priced through this range will be rejected. This is intended to provide a fair and orderly market in complex orders on the Exchange by filtering and rejecting inbound complex orders at prices that could be erroneous and/or disruptive.

Other Protections

The Exchange is proposing to suspend and in some cases restart trading in complex orders and quotes, to remove certain complex orders from the Strategy Book, and to end a complex Auction either early or at the end of the Response Time Interval when there is a wide market condition, SMAT Event and/or a halt in the underlying security of, or in an individual component of, a complex order. This protection is intended to protect investors and the public interest by causing the System not to execute during potentially disruptive conditions or events that could affect customer protection, and to resume trading in complex orders and quotes to the extent possible upon the conclusion or resolution of the potentially disruptive condition or event.

The System's proposed functionality during a wide market condition protects investors and the public interest by ensuring that the execution of complex orders and quotes on behalf of investors and the public will only occur at times when there is a fair and orderly market.

Risk Protection Monitor

The proposed amendment to Exchange Rule 519A, Risk Protection Monitor, to reject complex orders that exceed a Member-designated "Allowable Order Rate" and an "Allowable Contract Execution Rate" is designed to protect investors and the public interest by assisting Members submitting complex orders in their risk management. Members are vulnerable to the risk from system or other error or a market event that may cause them to send a large number of orders or receive multiple, automatic executions before they can adjust their order exposure in the market. Without adequate risk management tools, such as the Risk Protection Monitor, Members could reduce the amount of order flow and liquidity that they provide to the market. Such actions may undermine the quality of the markets available to customers and other market participants. Accordingly, the proposed amendments to the Risk Protection Monitor should instill additional confidence in Members that submit orders to the Exchange that their risk tolerance levels are protected, and thus should encourage such Members to submit additional order flow and liquidity to the Exchange with the understanding that they have this protection respecting all orders they submit to the Exchange, including complex orders, thereby removing impediments to and perfecting the mechanisms of a free and open market and a national market system and, in general, protecting investors and the public interest.

Obvious and Catastrophic Errors

The proposed amendment to Exchange Rule 521, Nullification and Adjustment of Options Transactions Including Obvious Errors protects investors and the public interest by extending the obvious error process for complex orders.

Under the proposal, if a complex order executes against another complex order on the Strategy Book and one or more components of the transaction is deemed eligible to be adjusted or nullified, the entire trade (all components) will be nullified, unless both parties agree to adjust the transaction to a different price within thirty (30) minutes of being notified by the Exchange of the decision to nullify the transaction. If a complex order executes against orders or quotes on the Simple Order Book, each component of the complex order will be reviewed and handled independently in accordance with Rule 521.

This addition to Exchange Rule 521 should help add more certainty to the obvious/catastrophic error process and reduce the price risk to parties trading on the Exchange, and mitigate risk for the parties to a complex order where all or one or more components of the complex order traded at an erroneous price. Parties to complex trades on MIAX will have less trading risk because all of the components will be nullified under the proposal.

This additional risk protection for parties to a complex trade promotes just and equitable principles of trade and is designed to protect investors and the public interest, by providing additional mechanisms through which investors may nullify or adjust erroneous trades, and is therefore consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues who offer similar functionality. The Exchange believes that the proposal to offer the ability to execute complex orders on the Exchange is pro-competitive by providing market participants with the opportunity to execute complex orders in a manner that is similar to that allowed on other options exchanges.

The Exchange believes that the proposal will enhance competition among the various markets for complex order execution, potentially resulting in more active complex order trading on all exchanges.

The Exchange notes that as to intramarket competition, its proposal is designed to treat all Exchange participants in the same category of participant equally. The Exchange believes that it is equitable and reasonable to afford trade allocation priority to certain categories of participants. The proposal to establish first priority to Priority Customer complex orders resting on the Strategy Book is consistent with the longstanding policies of customer protection found throughout the Act. Allocating thereafter to Market Maker Priority Interest for Complex is justified because Market Maker Priority Interest for Complex only applies if the Market Maker has a complex Standard quote in the complex strategy that equals or improves the dcMBBO. The Exchange's proposal to afford such a Market Maker priority in the Strategy Book is not new conceptually; Market Makers are afforded priority on the Exchange in the Simple Order Book in certain situations.[111] Thus, the Exchange believes that a Market Maker whose quoting activity qualifies for Market Maker Priority Interest for Complex is justifiably afforded priority with respect to such quoting activity.

The Exchange also believes that affording priority to them (after Priority Customer complex orders) is reasonable in light of the liquidity they provide, which other MIAX participants such as non-Market Maker Professional Interest participants are not required to provide.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–MIAX–2016–26 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2016–26. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MIAX–2016–26, and should be submitted on or before September 15, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[112]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–20213 Filed 8–24–16; 8:45 am]

BILLING CODE 8011–01–P

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[111] For example, after executions resulting from Priority Overlays when the pro-rata allocation method applies, if there is other interest at the NBBO, after all Priority Customer Orders (if any) at that price have been filled, executions at that price will be first allocated to other remaining Market Maker priority quotes, which have not received a participation entitlement, and have precedence over Professional Interest. *See* Exchange Rule 514(e)(i)[sic].

[112] 17 CFR 200.30–3(a)(12).

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION
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1985

FEDERAL REGISTER

Vol. 81 Thursday,
No. 165 August 25, 2016

Part V

The President

Proclamation 9475—100th Anniversary of the National Park Service

Federal Register
Vol. 81, No. 165
Thursday, August 25, 2016

Presidential Documents

Title 3—

The President

Proclamation 9475 of August 22, 2016

100th Anniversary of the National Park Service

By the President of the United States of America

A Proclamation

In 1872, the Congress established Yellowstone National Park—the first park of its kind anywhere in the world. Decades later, the passage of the Antiquities Act in 1906 created our first national historic preservation policy. Under this new authority, and heavily inspired by his time in nature with conservationist John Muir, President Theodore Roosevelt set aside 18 new monuments and landmarks, adding to the scattered collection of existing parks throughout our country. One decade later, in order to provide the leadership necessary for maintaining our growing system of parks, the Congress passed monumental legislation—which President Woodrow Wilson signed on August 25, 1916—to create the National Park Service (NPS). All existing National Parks were placed under the management of the NPS, ushering in a new era of conservation, exploration, and discovery—and securing, throughout the century that would follow, the profound legacy of an interconnected system of natural wonders.

Over the course of the past 100 years, our national park system has grown to include more than 400 locations across our country. Ranging from seashores to waterfalls, winding trails to rugged mountains, historic battlefields to monuments and memorials, every treasured site under the NPS is uniquely American. Our parks play a critical role in environmental stewardship, ensuring that precious wildlife can thrive and that ecosystems can provide the many benefits on which we depend. They have sustained the stories and cultures that define the American experience, and they embody the people and movements that distinguish our Nation's journey.

As we reflect on the many natural and cultural gifts that our National Parks provide, we must also look to the next century and pledge to secure our precious resources. That is why my Administration has protected over 265 million acres of public lands and waters—more than any Administration in history—and worked to save endangered and vulnerable species and their vital habitats. Climate change poses the biggest threat to our planet and our parks and is already dangerously affecting park ecosystems and visitor experiences. It is imperative that we rise to meet this challenge and continue leading the global fight against climate change to ensure that our parks remain healthy for all who will come after us.

Often called "America's best idea," our National Parks belong to Americans of all ages and backgrounds. NPS sites and their recreational, educational, and public health benefits are our American birthright. Last year, these sites welcomed more than 300 million visitors, and my Administration is committed to helping all our people access and enjoy these public lands and waters. Through our "Every Kid in a Park" initiative, we have made our National Parks free to fourth grade students and their families so that more children, from any community or walk of life, can spend time being active in our outdoor spaces while learning about these natural treasures—something that First Lady Michelle Obama has also advocated for through her *Let's Move!* initiative. And through the Joining Forces initiative that she and Dr. Jill Biden have championed, more of our troops and military families can enjoy our National Parks. We must expand on these programs and increase opportunities for people in underserved communities to experience the great outdoors as well. The second century of the NPS will rely on the support and engagement of young people who are visiting more parks through the "Find Your Park" campaign, and we must encourage this rising generation of Americans by inviting them to make their own personal connections to the places that have shaped our history.

NPS parks and programs strive to tell our diverse stories, allowing us to learn from the past and help write our country's next great chapters. In celebration of the 100th anniversary of the National Park Service, let us thank all those who—through their dedication to the mission of the NPS—help our country build on the legacy left by all those who came before us. As we look to the next century and embrace the notion that preserving these public spaces in ways that engage, reflect, and honor all Americans has never been more important, let us summon the foresight and faith in the future to do what it takes to protect our National Parks for generations to come.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim August 25, 2016, as the 100th Anniversary of the National Park Service. I invite all Americans to observe this day with appropriate programs, ceremonies, and activities that recognize the National Park Service for maintaining and protecting our public lands for the continued benefit and enjoyment of all Americans.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-second day of August, in the year of our Lord two thousand sixteen, and of the Independence of the United States of America the two hundred and forty-first.

[FR Doc. 2016–20587
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